No. 14-1382

Title:	Americold Realty Trust, Petitioner
	v.
	ConAgra Foods, Inc., et al.
Docketed:	May 22, 2015
Lower Ct.:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(13-3277)
Decision Date:	January 27, 2015
Rehearing Denied:	February 23, 2015

Questions Presented

—Date—	——Proceedings and Orders----------
May 15 2015	Petition for a writ of certiorari filed. (Response due June 22, 2015)
Jun 22 2015	Waiver of right of respondent ConAgra Foods, Inc., et al. to respond filed.
Jul 8 2015	DISTRIBUTED for Conference of September 28, 2015.
Jul 23 2015	Response Requested (Due August 24, 2015)
Aug 12 2015	Brief of respondents ConAgra Foods, Inc., and Swift-Eckrich, Inc. in opposition filed.
Aug 26 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Oct 16 2015	Letter from counsel for the respondents advising Clerk of position on the merits.
Nov 13 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including November 23, 2015.
Nov 23 2015	Joint appendix filed. (Statement of costs filed)
Nov 23 2015	Brief of petitioners Americold Logistics, LLC, et al. filed.
Nov 23 2015	Joint motion to dismiss Americold Logistics, LLC as a dispensable party filed.
Nov 24 2015	SET FOR ARGUMENT on Tuesday, January 19,2016
Nov 30 2015	Motion DISTRIBUTED for Conference of December 4, 2015.
Nov 30 2015	Brief amicus curiae of Winston Wen-Young Wong filed.
Nov 30 2015	Brief amicus curiae of National Association of Real Estate Investment Trusts filed.
Dec 4 2015	Motion to dismiss Americold Logistics, LLC as a dispensable party GRANTED.
Dec 4 2015	Record requested from U.S.C.A. 10th Circuit.
Dec 8 2015	Record received from the U.S.C.A. 10th Circuit is located on PACER, with the exception of the pleadings enclosed in one box.
Dec 15 2015	CIRCULATED.
Dec 23 2015	Brief of respondents ConAgra Foods, Inc., and Swift-Eckrich, Inc. filed. (Distributed)
Jan 12 2016	Reply of petitioner Americold Realty Trust filed. (Distributed)
Jan 19 2016	Argued. For petitioner: Michael D. Pospisil, Kansas City, Mo. For respondents: John M. Duggan, Overland Park, Kan.
Mar 7 2016	Adjudged to be AFFIRMED. Sotomayor, J., delivered the opinion for a unanimous Court.

Apr 8 2016 JUDGMENT ISSUED

14-1382
No.

Supreme Court, U.S.
FILED
MAY 15 2015
OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMERICOLD LOGISTICS, LLC,
AND AMERICOLD REALTY TRUST,

Petitioners,

v.

CONAGRA FOODS, INC.,
AND SWIFT-ECKRICH, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Americold Logistics, LLC and Americold Realty Trust – a corporation and real estate investment trust, respectively – removed a case from Kansas state court to the United States District Court for the District of Kansas, asserting the parties were diverse. No party challenged the removal, and the District Court ruled on the merits of that litigation without addressing any issue relating to diversity jurisdiction. Likewise, neither party raised any jurisdictional challenge on appeal to the Tenth Circuit Court of Appeals.

The Tenth Circuit, however, *sua sponte* queried whether there was full diversity of citizenship among the parties. In particular, the judges challenged whether the citizenship of Americold Realty Trust, a business trust, should be determined by reference to its trustees' citizenship, or instead by reference to some broader set of factors. This issue has deeply split courts across the country. Joining the minority of courts, the Tenth Circuit held the jurisdictional inquiry extends, at a minimum, to the citizenship of a trust's beneficiaries in addition to its trustees' citizenship. In this case, doing so destroyed diversity of citizenship among the parties.

QUESTION PRESENTED – Continued

The question presented by this petition is: Whether the Tenth Circuit wrongly deepened a pervasive circuit split among the federal circuits regarding whether the citizenship of a trust for purposes of diversity jurisdiction is based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Americold Logistics, LLC is a wholly owned subsidiary of Americold Realty Trust. Americold Realty Trust is a Maryland real estate investment trust; it is the legal successor to Americold Corporation. No parent corporation or publicly held company owns ten percent or more of Americold Realty Trust stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners submit this petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit decision below is reported at 776 F.3d 1175 (10th Cir. 2015). *See* Appendix ("App.") at 1-16. The Tenth Circuit's order staying the mandate pending this petition is unreported but reprinted at App. at 19-20.

The District of Kansas decision on the merits is unpublished but available at 2103 Westlaw 5530274 and App. at 23-40.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 2015. The court denied a timely petition for rehearing *en banc* on February 23, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1332(a), which provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

It also involves 28 U.S.C. § 1332(c):

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State

where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

STATEMENT OF THE CASE

This case concerns a threshold inquiry that arises every day in federal courts across the country. Constitutional limitations on federal jurisdiction make federal courts "courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). One of those limited categories is disputes involving more than $75,000 and involving "citizens of different States." 28 U.S.C. § 1332(a)(1). *See, e.g., Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998) ("A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same state."). The Tenth Circuit's ruling below, which adopted the minority position in an intractable circuit split, would unfairly close the federal courts to trusts, one of the most commonly used business entities responsible for billions of dollars in annual commerce.

This petition illuminates the irreconcilable split among the courts of appeals regarding the test for determining the jurisdiction of a trust for diversity purposes. The vast majority of circuits look to the citizenship of the trustees – the actors that actually control the actions of the trust. The Tenth Circuit departed from the norm, however, and has chosen to follow the minority of circuits that look to the citizenship of the trusts' beneficiaries. In doing so, the Tenth Circuit candidly noted the split in authority on the issue. On top of this, yet other courts apply even *different* tests in determining citizenship.

The split in authority has reached a point of no return. Unless decided by this Court, whether a trust may or may not make use of the federal court system will be determined by subjective factors dependent on anything from a Plaintiff's choice of defendant, a particular geographical location, or even a particular court or panel.

1. Background

On December 28, 1991, a fire destroyed an underground storage facility in Kansas City, Kansas. Americold Corporation owned and operated the facility in which Plaintiffs leased space for storage of food products. Several lawsuits were filed against Americold Corporation in April 1992 as a result of that accident and were consolidated (the "Kansas Action"). In March 1994, the parties reached a settlement that included an assignment to Plaintiffs of

the right to seek recovery of insurance proceeds and amounts in excess of policy limits from Americold Corporation's excess carriers, including Northwestern Pacific Indemnity Company ("NPIC"). The settlement also provided for the entry of a consent judgment against Americold in excess of $58 million. App. at 25-27.

A. State Court Proceedings

In September 1994, after the entry of consent judgments against Americold Corporation in the Kansas Action, Plaintiffs commenced garnishment proceedings against Americold's insurers, including NPIC. App. at 28. That litigation lasted *eighteen years* from 1994 to 2012. Those eighteen years of disputes in the Kansas state court system included three trips to the Kansas Supreme Court. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (1997) ("*Americold I*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231 (1999) ("*Americold II*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 270 P.3d 1074 (2011) ("*Americold III*").

The garnishment action proceeded to a ten-week bench trial in the Fall of 2005. Near the end of the trial, NPIC sought to dismiss the garnishment proceedings on the newly discovered grounds that the District Court lacked subject-matter jurisdiction to conduct the garnishment proceedings because the consent judgments were dormant and extinct under Kansas law. In January 2006, the District Court

entered an order denying NPIC's motion to dismiss the garnishment action, and in August 2007 entered judgments against NPIC. App. at 28.

NPIC appealed. App. at 29. In December 2011, the Kansas Supreme Court reversed the District Court decision, holding that, because "Americold was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold." *Americold III*, 270 P.3d 1074, 1083. As a result of this ruling, Plaintiffs' underlying judgments were recognized to be extinguished, depriving the District Court of jurisdiction to proceed with the garnishment action. The Kansas Supreme Court remanded the case to the District Court with instructions to dismiss the garnishment proceedings. *Id.* Pursuant to that decision, the District Court dismissed the garnishment action and vacated the judgments against NPIC in June 2012. App. at 29.

B. Proceedings Below

1. District of Kansas

Plaintiffs returned to state court only three months after the Kansas Supreme Court's decision in *Americold III*. Plaintiffs filed a petition in state court in September 2012 against Americold Corporation's successor in interest – Americold Realty Trust – and Americold Logistics LLC asserting claims for breach of contract arising out of Americold's refusal to

execute Stipulations of Revivor that would allow Plaintiffs to execute on the 1994 Consent Judgments.[1] Plaintiffs claimed this refusal violated the settlement term that Americold would "execute any additional documents necessary to effectuate the purpose and intent of [the Settlement Agreement] or to pursue the assigned claims or execute on the judgments obtained by plaintiffs." App. at 31-32.

Americold Realty Trust is controlled by a Board of Trustees. App. at 56. Those trustees control virtually all aspects of the Trust. According to Americold's Articles of Amendment and Restatement, the trustees have "full, exclusive and absolute power, control and authority over any and all property" of Americold Realty Trust. App. at 60. However, Plaintiffs did not file this lawsuit against the controlling trustees. Instead, the petition names Americold Realty Trust and its wholly-owned Americold Logistics, LLC.

Without objection, Americold removed the case to the United States District Court for the District of Kansas on the basis of diversity jurisdiction. The parties filed cross-motions for summary judgment. None of the parties challenged the removal, and the District Court raised no quarrel with the parties' entitlement to federal jurisdiction. The District Court

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[1] Petitioner Americold Realty Trust, a Maryland real estate investment trust, is the legal successor to Americold Corporation. It also wholly owns the other Petitioner, Americold Logistics, LLC. For ease of reference, this Petition refers to all of these entities, collectively, as "Americold."

granted Americold's motion for summary judgment on the merits in October 2013, holding the consent judgments were "extinguished" as a matter of law and could not be revived under Kansas law. App. at 40. *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 2013 WL 5530274 at *7. Some of the Plaintiffs appealed this decision to the Court of Appeals for the Tenth Circuit.

2. Tenth Circuit

Following the submission of merits briefs, the Tenth Circuit *sua sponte* raised a potential jurisdictional defect in the notice of removal. The panel ordered supplemental briefing to address whether the notice of removal established diversity jurisdiction because it addressed the citizenship of the trustees without reference to the citizenship of the beneficial shareholders or beneficiaries of Americold Realty Trust. App. at 21-22.

Plaintiffs' decision to sue Americold Realty Trust – the *entity*, rather than its trustees – would prove fateful for purposes of diversity jurisdiction. Only two of the original Plaintiffs appealed the District Court's order: ConAgra Foods, Inc. f/k/a ConAgra, Inc. (a Delaware corporation with its principal place of business in Nebraska) and Swift-Eckrich, Inc. (a Delaware corporation with its principal place of business in Illinois). None of the Americold trustees were

domiciled in or residents of Delaware, Nebraska, or Illinois.[2] App. at 57

In its supplemental brief, Americold argued that, consistent with *Navarro Savings Association v. Lee*, "the citizenship of a real estate investment trust is determined solely by the citizenship of its trustees," and that the Court specifically rejected determining citizenship based on "the location of the '9,500 beneficial shareholders'." App. at 47 (citing *Navarro Savings Association v. Lee*, 446 U.S. 458, 464 (1980)). Americold also argued the Tenth Circuit previously held on at least three occasions, consistent with *Navarro*, that "where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." App. at 48 (citing *Ravenswood Investment Co., L.P. v. Avalon Correctional Servs.*, 651 F.3d 1219, 1222, n.1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller*, 500 Fed. Appx. 723, 728, n.2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998) (all citing *Navarro*)). Notably, the only two Plaintiffs that appealed the District Court order concurred that "the Americold Realty Trust's citizenship is determined by the citizenship of its trustees." App. at 5.

The Tenth Circuit rejected both parties' arguments. Distinguishing *Navarro*, the court reasoned that, because *Navarro* involved a suit brought by trustees and not the trust itself, it did not determine

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[2] That remains true to this day.

the rule for establishing the citizenship of a trust. Instead, the court opined that *Navarro* stood "for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries." App. at 7; *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1178 (10th Cir. 2015).

The court also relied on the decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), which "dictates that the citizenship of any non-corporate artificial entity is determined by considering all of the entity's members." *Id.* at 1180. The Tenth Circuit noted numerous other circuit courts have relied on *Navarro* – even after *Carden* – for the proposition that the citizenship of a trust is based on the citizenship of its trustees; the court stated that those holdings were unpersuasive because they did not explicitly discuss "how the Supreme Court's decision in *Carden* bears on the question." *Id.* at 1178.

In breaking from the majority of circuits, the Tenth Circuit distilled the following rule:

> When a trustee is a party to litigation, it is the trustee's citizenship that controls for purposes of diversity jurisdiction, as long as the trustee satisfies the real-party-in-interest test set out in *Navarro*. When the trust itself is party to the litigation, the citizenship of the trust is derived from all the trust's "members."

App. at 13-14 (776 F.3d at 1181). Further, the Tenth Circuit held that the trust's "members" included, at a minimum, its beneficiaries. When Americold Realty Trusts' beneficiaries are considered, its citizenship includes Kansas and is thus not diverse for jurisdictional purposes. *Id.* The court declined to "go any further and determine whether a trust's membership also includes its trustees," and remanded the case to the District Court to vacate its judgment and remand the matter to state court. *Id.* at 1182.

REASONS FOR GRANTING THE WRIT

Trusts are critical actors in modern American commerce. Real estate investment trusts (REITs) like Americold Realty Trust hold approximately $1.7 trillion in gross assets. More than 70 million Americans invest in REITs through pension and retirement plans. More than 40,000 properties in the United States are owned by the 1,100 REITs that have filed tax returns in the United States.[3] And REITs represent only a small fraction of the total number of trusts conducting business in the United States today.

Despite the prevalence of trusts in commerce, federal courts currently employ different tests to determine whether those trusts may access federal

[3] *See* National Association of Real Estate Investment Trusts, *REITs by the Numbers* (2015), <www.reit.com/investing/reit-basics/reits-numbers>.

courts through diversity jurisdiction. Indeed, there are even pervasive intra-circuit and intra-district disagreements on the proper legal standards to employ. The Tenth Circuit's opinion further deepened that split – a split that cannot be resolved without this Court's intervention.

The deep split among the lower courts has reached critical mass. Although trusts are deeply engrained in today's business world, the federal court house remains shut for many trusts. The key to the door is based on who a Plaintiff decides to sue or where the lawsuit is filed. Uniformity is lacking, but necessary, for the orderly operation of the federal courts.

I. This Court Has Emphasized That Trustees Are the Parties-in-Interest for Litigation Involving the Legal Rights and Responsibilities of a Trust.

The lower courts are stubbornly divided in their interpretation of the impact of two Supreme Court decisions on the question presented: *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980), and *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). In *Navarro*, individual trustees of real estate investment trust Fidelity Mortgage Investors brought a breach of contract suit against Navarro Savings Association for Navarro's alleged failure to cover its obligation to secure the loan of a debtor to the Fidelity trust. *Navarro Savs. Ass'n*, 446 U.S. at 458. The complaint,

filed in a Texas federal court, premised federal jurisdiction on diversity of citizenship. *Id.* at 459. Navarro was a Texas citizen and each Fidelity trustee was a citizen of another state. However, the parties stipulated that some of the *beneficiaries* of the Fidelity trust were citizens of Texas. *Id.* at 460. Concluding that a business trust is a citizen of every state in which its shareholders reside, the District Court dismissed the action for lack of subject matter jurisdiction. *Id.*

The Court of Appeals for the Fifth Circuit reversed. The court held the trustees were the real parties in interest to the litigation because they had full power to manage and control the trust; the District Court was directed to proceed to trial on the merits. 597 F.2d 421 (1979). Navarro appealed, and this Court granted certiorari to resolve the question "whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." *Navarro Savs. Ass'n,* 446 U.S. at 458.

This Court held in an 8-1 opinion that the citizenship of the trustees, rather than the beneficiaries, controlled the diversity inquiry. The main reason was the real-party-in-interest doctrine: "[A] trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the

benefit of others." *Id.* at 464-65.[4] The Court contrasted that role with trust beneficiaries who "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Id.* at 465.

Navarro specifically rejected determining citizenship based on the location of the "9,500 beneficial shareholders" and further explained "[t]he residence of those who may have an equitable interest is simply irrelevant" for purposes of determining whether diversity exists. *Id.* at 463-64 (quoting *Bonnafee v. Williams*, 44 U.S. (3. How.) 574, 577 (1845)). Because the trustees had authority over the actions and business of the trust, the trustees "may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship without regard to the citizenship of the trust beneficiaries." *Id.* at 458. The holding in *Navarro* aligned with the long-held legal standard that permitted trustees to sue in their own right, "without regard to the citizenship of the trust beneficiaries." *Id.* at 466; *see also Bullard v. Cisco*, 290 U.S. 179, 190 (1933) (holding the extensive rights, powers, and duties assigned to committee members made them trustees and the parties in

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[4] That is plainly the role of Americold's trustees in the instant case. According to Americold's Articles of Amendment and Restatement Americold's trustees "full, exclusive and absolute power, control and authority over any and all property of the Trust." App. at 60-61.

interest, while "beneficiaries were not necessary parties and their citizenship was immaterial").

Lower courts uniformly applied the *Navarro* rule in holding trustees controlled the citizenship of a trust prior to this Court's decision in *Carden*. *See, e.g., Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986) ("Before the *Navarro* decision, lower courts had frequently held citizenship of the beneficiaries of a business trust relevant to determination of diversity jurisdiction. *Navarro* has clearly overruled these cases which relied on analogizing a business trust to an unincorporated association."); *Goldstick v. ICM Realty*, 788 F.2d 456, 458 (7th Cir. 1986) ("The citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee"); *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985) ("only the citizenship of the trustee of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction.").

A decade after *Navarro*, the Court disrupted that uniformity with *dicta* in a case that did not involve a trust or trustees. Rather, in *Carden*, the Court was confronted with a limited partnership suing guarantors of a lessee's obligation under a lease for drilling rigs. *Carden*, 494 U.S. at 186. The disputed issue in that case was whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine the citizenship of the partnership for diversity jurisdiction. *Id.*

The respondent Arkoma in *Carden* argued in part, by analogy, that "just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy" as in *Navarro*, "so also it should be taken into account for purposes of determining whether an artificial entity is a citizen." *Id.* at 192. The Court was not convinced, and a 5-4 majority held that, for the limited partnership at issue, "diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members," including the limited partners. *Id.* at 195. In *dicta*, the Court added gratuitously that *Navarro* addressed a suit by the trustees in their own names, not the trust itself, and did not necessarily decide the citizenship of the trust because the inquiry was ultimately about the diversity of the trustees as named parties. *Id.* at 192-93.

II. The Lower Courts Are In Disarray in Determining the Citizenship of Trusts.

The lower courts have interpreted *Navarro* and *Carden* in drastically different ways. Most lower courts interpret *Carden* to recommend that they determine a trust's citizenship by reference to its trustees. *See, e.g., Ryan Int'l Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041, at *3 (N.D. Ill. Mar. 14, 2011) ("post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*."). However, other lower courts cite *Carden*

for a much different – and broader – proposition: that courts must consider the citizenship of *all* parties in a trust, including its beneficiaries or shareholders, to determine the citizenship of the trust itself. *See, e.g., Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192 (3d Cir. 2007) (applying *Carden* to a trust to hold that trustees and beneficiaries must be considered for a citizenship analysis). The split goes even deeper, though, as some courts apply variants on those rules whereby the citizenship of some but not all parties to a trust must be examined. For example, in some courts, the beneficiaries' citizenship is examined, while other courts look only to the shareholders (and *not* to the beneficiaries).

The split in the lower courts is openly acknowledged. *See, e.g., Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 200 (3d Cir. 2007) ("the court might determine the citizenship of a trust by selecting among four possible tests"); *General Retirement Sys. of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *3-4 (E.D. Mich. Dec. 20, 2010) ("Contrary to the law of the Second, Fifth, Sixth, Seventh and Ninth Circuits, the Third Circuit Court of Appeals held that the citizenship of both the trustee and beneficiary should control in determining the citizenship when the named party is the trust.").

The lower courts currently employ no fewer than four distinct rules to determine which parties must be considered in the citizenship determination of a trust: 1) trustees; 2) beneficiaries or shareholders; 3) *both*

trustees and beneficiaries; and 4) at least *either* trustees or beneficiaries. Moreover, the Wright & Miller treatise advocates for *yet another rule* – a case-by-case rule in which "[t]he citizenship of an active trustee, rather than that of the beneficiaries of the grantor, is decisive, but again a different result is reached with regard to a passive trustee who has only a naked legal title to the property." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3606 (2d ed. 1984).

In the twenty-five years since *Carden*, the circuit split has shown no signs of resolving itself. It has only gotten worse and splintered into "sub-splits" and even intra-district conflicts.[5] As one law-review article put

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[5] For example, Southern District of New York is awkwardly split in *three* different directions about how to determine the citizenship of trusts. *Compare Dargahi v. Hyman*, No. 05 Civ. 8500BSJ, 2007 WL 2274861 at *4 (S.D.N.Y. Feb. 9, 2007) ("Business trusts apparently have the citizenship of their trustees"), with *FMAC Loan Receivable Trust 1997-C v. Strauss*, No. 03 Civ. 2190(LAK), 2003 WL 1888673, at *2 (S.D.N.Y. Apr. 13, 2003) ("LBR has the citizenship of both its trustee and its beneficiaries"), and *Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 226 (S.D.N.Y. 2013) ("The Court finds the decision in Emerald well-reasoned and, in light of the Court's conclusion that the Second Circuit has not spoken on the question before it, believes that it states the correct rule regarding the citizenship of trusts for diversity purposes").

The Eastern District of Michigan is also split within itself. *Compare General Retirement System of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *4 (E.D. Mich. Dec. 20, 2010) ("when considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only."), *with JP Morgan*

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it, the confusion surrounding the citizenship of a trust has resulted in "mass confusion and dissention in lower courts." Jonathan J. Ossip, Note, *Diversity Jurisdiction and Trusts*, 89 N.Y.U. L. Rev. 2301, 2334 (2014). As demonstrated by the Tenth Circuit decision here, that confusion continues to strongly divide the lower courts. Further percolation serves no useful purpose.

A. The Majority of Courts Hold Trustees Determine the Citizenship Determination of a Trust

The large majority of courts determine the citizenship of a trust by reference only to the trust's real parties in interest: the trustees.[6] These courts include

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Chase Bank, N.A. v. Century Trust Co. of Mich., No. 10-cv-11877, 2010 WL 2556867, at *2 (E.D. Mich. June 22, 2010) ("The citizenship of a trust is determined by the citizenship of its trustees and its beneficiaries.").

[6] *See, e.g., Erlich v. Ouellette, Labonte, Roberge and Allen, P.A.*, 637 F.3d 32, 34, n.2 (1st Cir. 2011) ("a trust – which we presume the Fund to be – is in some cases a citizen of whatever states its trustees are citizens of"); *Grede v. Bank of New York Mellon*, 598 F.3d 899, 901 (7th Cir. 2010) ("only a trustee's citizenship counts"); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386 (5th Cir. 2009); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("The citizenship of a trust is that of the trustee"); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002) ("For diversity purposes a trust is a citizen of whatever state the trustee is a citizen of."); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 Fed.Appx. 731,

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732 (6th Cir. 2002) ("a business trust has the citizenship of its trustees."); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 931 (2d Cir. 1998) ("The second possibility concerns trusts, as to which the Supreme Court has deemed the citizenship of the trustees to be determinative") (citing *Navarro Savings Ass'n*); *Goldstick v. ICM Realty*, 788 F.2d 456, 458 (7th Cir. 1986) ("The citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee"); *New York State Teachers Retirement System v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985) ("only the citizenship of the trustee of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction."); *Watkins v. Trust Under Will of Bullitt ex rel. PNC Bank, N.A.*, No. 3:13-CV-01113-TBR, 2014 WL 2981016, at *3 (W.D. Ky. July 1, 2014) ("Regardless of the named plaintiff's identity, it is the trustee who possesses the authority to manage assets and make decisions on the trust's behalf. Therefore, the trustee is the real party."); *Liquidating Tr. of the App Fuels Creditors Trust v. W.Va. Alloys, Inc.*, No. 2:13-30266, 2014 U.S. Dist. LEXIS 57174, at *17-18 (S.D.W.V. Apr. 24, 2014) ("The test with respect to the citizenship of an entity is distinct from the test applied with respect to the citizenship of trustees if they sue in their own names. When trustees sue in their own names it is critical that they be the real parties to the controversy."); ("A trust has the citizenship of its trustee."); *Whitlock v. FSL Management, LLC*, No. 3:10CV-00562-JHM, 2012 WL 3109491 at *2 (W.D. Ky. July 31, 2012); *Schaftel v. Highpointe Bus. Trust*, No. WMN-11-2879, 2012 WL 219511, at *2 (D. Md. Jan. 24, 2012) ("For purposes of diversity jurisdiction, the court looks to the citizenship of its trustee"); *Ryan Int'l Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041, at *3 (N.D. Ill. Mar. 14, 2011) ("Post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*."); *General Retirement System of the City of Detroit v. UBS AG*, No. 10-CV-13920, 2010 WL 5296957, at *4 (E.D. Mich. Dec. 20, 2010) ("When considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only."); *Feiner Family Trust v. VBI Corp.*, No.

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the First, Fourth, Fifth, Sixth, Seventh, and Ninth Courts of Appeals and at least a dozen District Courts. These courts extend the reasoning of *Navarro* to include trusts, citing *Navarro* when holding that the citizenship of trustees determine the citizenship of the trust. *See, e.g., Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 222 (S.D.N.Y. 2013) ("A number of Circuit Courts of Appeals have cited *Navarro* for the broad proposition that the citizenship of a trust is determined by its trustees."). These courts reject the argument that *Carden* extended the citizenship inquiry beyond the trustees. *See, e.g., Ryan Intern. Airlines, Inc. v. East Trust SUB-2,* No. 10 C 50135, 2011 WL 893041 at *3 (N.D. Ill. Mar. 14, 2011)

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07 Civ. 1914(RPP), 2007 WL 2615448, at *3 (S.D.N.Y. Sept. 11, 2007) ("For purposes of diversity, a trust is a citizen of the state where its trustee is domiciled"); *Dargahi v. Hyman*, No. 05 Civ. 8500BSJ, 2007 WL 2274861, at *4 (S.D.N.Y. Feb. 9, 2007) ("Business trusts apparently have the citizenship of their trustees"); *Bostic Dev. at Lynchburg LLC v. Liberty University, Inc.*, No. Civ.A.6:05 CV 00013, 2005 WL 2065251, at *1 (W.D. Va. Aug. 25, 2005) ("It is the citizenship of the trustee, and not of the beneficiary, that is relevant because when a trustee possesses certain customary powers to hold, manage, and dispose of a trust's assets, he is the real party to the controversy."); *Boyd Machine & Repair Co., Inc. v. Freedman*, No. 1:03-CV-57, 2003 WL 21919214, at *1 (N.D. Ind. Mar. 7, 2003) ("Citizenship is the citizenship of all the trustees, rather than the beneficiaries"); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F. Supp. 425 (N.D. Ga. 1975) ("If it is treated as a traditional trust, with its citizenship deemed to be that of each of its trustees, then diversity exists"); *In re Mortgages Ltd.*, 452 B.R. 776, 776 (D. Ariz. 2011) ("Citizenship of trustee, as real party in interest, was controlling in determining existence of diversity jurisdiction").

("post-*Carden*, the Seventh Circuit has continued to apply a bright-line rule based on *Navarro* and, unlike the Third and Eleventh Circuits, is not convinced that *Carden* undermines *Navarro*.").

From 1986 until as recently as 2010, the Seventh Circuit has consistently held the citizenship of a trust is determined by the citizenship of its trustees. For example, in *May Department Stores*, the court considered a diversity suit for breach of contract of liability insurance brought by an ERISA pension plan and the company that sponsored and administered the plan. *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002). The court raised *sua sponte* the question of whether the May pension plan, a trust, was diverse for jurisdictional purposes. Judge Richard Posner emphasized the Seventh Circuit's rule: "[F]or diversity purposes a trust is a citizen of whatever state the trustee is a citizen of." *Id.* at 599 (citing *Navarro Savings Ass'n*, 466 U.S. at 464-66). The parties in this case were not diverse, according to the Seventh Circuit, because a trustee of the May plan was a citizen of the same state as another party. *Id.*

Judge Frank Easterbrook echoed that same rule in a 2006 case in which an engineering company with trusts in its corporate structure sued a competing company for alleged violations of Wisconsin's trade secret act. *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). In discussing those trusts, the court emphasized that "[t]he citizenship of a trust is that of the trustee." *Id.* at 348. Judge Easterbrook reiterated that rule four years later in *Grede v. Bank*

of New York Mellon, 598 F.3d 899, 901 (7th Cir. 2010) ("[A] trust's citizenship is that of the trustee, rather than the beneficiaries, for the purpose of 28 U.S.C. § 1332(a). . . . only a trustee's citizenship counts.")

The Fifth Circuit has also held a trust's citizenship depends on the citizenship of its trustees. In *Mullins v. Test America, Inc.*, 564 F.3d 386 (5th Cir. 2009), a prior owner of a Texas company sued the entity that purchased his company for breach of contract and fraud. On initial appeal, the court *sua sponte* raised the issue of subject matter jurisdiction regarding the citizenship of party Sagaponack, a partnership with one general partner and multiple limited partners, including three trusts. *Id.* at 397. The Fifth Circuit examined the citizenship of each of the 32 relevant partners, determining that the citizenship of the three trusts were that of their trustees. *Id.* at 397, n.6 (citing *Navarro*). Notably, the Fifth Circuit considered the Court's decision in *Carden* in this holding, citing *Carden* in its reasoning that the partnership must distinctly and affirmatively allege the citizenship of all its general and limited partners, information crucial to determining whether diversity jurisdiction existed. *Id.* (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990)).

The Second Circuit employs the same rule. In *E.R. Squibb & Sons, Inc. v. Accident & Casualty Insurance Co.*, 160 F.3d 925 (1998), the Second Circuit considered diversity jurisdiction for a group of insurers including Lloyd's of London in a case regarding insurance policies provided by the appellants. The

parties urged the court to apply the rule in *Navarro* – that the trustees control the citizenship of the trust – to the lead underwriter of Lloyd's, because the Lloyd's market is a trust and the lead underwriter acted as a trustee. *Id.* at 931. The Second Circuit agreed with the parties that the citizenship of the trustee controls the citizenship of the trust as a whole, but held that underwriters were not similar to trustees in that "[t]rustees *own* the corpus" while "underwriters do not own [the insurance policy's] wealth or exercise over it any dominion other than the power to underwrite risks." *Id.* (emphasis in original) (citing *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998)).

Similarly, the Ninth Circuit applies the rule in diversity cases that the citizenship of a trust is dependent on the citizenship of its trustees. *See Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). In that case, a limited partnership with a trust in its corporate structure sued a corporation for failure to pay for crane services provided in connection with the construction of a hotel. *Id.* at 896. In determining the citizenship of the parties, the court held "[a] trust has the citizenship of its trustee or trustees." *Id.* at 899 (citing *Navarro Sav. Ass'n*, 446 U.S. at 464). The court held that jurisdiction was proper based on the citizenship of the trustees. *Id.*

The First Circuit, in *Erlich v. Ouellette, Labonte, Roberge and Allen, P.A.*, 637 F.3d 32 (1st Cir. 2011), addressed when the state-law causes of action of a pension fund against an auditor and actuary accrued.

In its analysis of the parties' diversity, the court cited *Navarro* for the proposition that the pension fund, as a trust, is a "citizen of whatever states its trustees are citizens of." *Id.* at 34, n.2 (also citing *Appleyard v. Douglass,* 141 F.3d 1149, 1998 WL 104680, at *2 (1st Cir. 1998) (unpublished table decision) (dicta)). The parties here were diverse under that analysis.

The Sixth Circuit addressed this issue in *Homfeld II LLC v. Comair Holdings, Inc.*, 53 Fed. Appx. 731 (6th Cir. 2002). In that case, a holding company backed out of its acquisition agreement with an airline, which led to a suit against that company by the third party entities that leased planes to the airline. The court conducted a preliminary jurisdictional analysis of the leasing companies, which included two limited liability companies and a business trust. *Id.* at 732. The leasing companies failed to allege the citizenship of their members and trustees, which was required to establish diversity because, the court held, "a limited liability company is not treated as a corporation and has the citizenship of its members, and a business trust has the citizenship of its trustees." *Id.* (citing *Cosgrove v. Bartolotta,* 150 F.3d 729, 731 (7th Cir. 1998); *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 464 (1980)).

The majority of District Courts likewise hold the citizenship of a trust depends on the citizenship of its trustees. For example, the Western District of Virginia directly addressed the diversity of citizenship for the parties using reasoning from both *Carden* and *Navarro. Bostic Development at Lynchburg LLC v.*

Liberty University, Inc., No. Civ.A.6:05 CV 00013, 2005 WL 2065251 (W.D. Va. Aug. 25, 2005). One of the members of a constituent LLC was an investment trust. *Id.* The court explained "the citizenship of a partnership or other unincorporated entity is defined by the citizenship of its members" as described in *Carden*. *Id.* at *1. The court cited *Navarro* in holding "when determining jurisdiction citizenship for the trust, courts look to the citizenship of the trustee who maintains it." *Id.* The court further explained: "It is the citizenship of the trustee, and not of the beneficiary, that is relevant because when a trustee possesses certain customary powers to hold, manage, and dispose of a trust's assets, he is the real party to the controversy." *Id.* The court dismissed the claim for the party's failure to properly plead the citizenship of its trustee. *Id.* at *2.

Likewise, the Northern District of Illinois relied on both *Carden* and *Navarro* holding the citizenship of a trust is determined by reference to its trustees. *Ryan Intern. Airlines, Inc. v. East Trust SUB-2*, No. 10 C 50135, 2011 WL 893041 (N.D. Ill. Mar. 14, 2011). The trust asserted it had the citizenship of all its members and beneficiaries, and that diversity was compromised because one of its beneficiaries shared citizenship with another party. *Id.* The court discussed the holding in *Navarro*, explaining the trustees who had legal title, managed the assets, and controlled the litigation, were the real parties to the controversy, as opposed to the beneficiaries of the trust. *Id.* The court explained that, using the reasoning in

Navarro even after the Supreme Court decided *Carden*, "the Seventh Circuit has consistently held that the citizenship of a trust for purposes of § 1332(a) diversity jurisdiction is that of the trustee." *Id.* at *3 (quoting *Carden v. Arkoma Associates*, 494 U.S. 185, 192-93 (1990)). Because the trustees were of diverse citizenship, the motion to dismiss was denied. *Id.*; *see also, e.g., Quantlab Fin., LLC v. Tower Research Capital, LLC,* 715 F. Supp. 2d 542 (S.D.N.Y. 2010) ("While neither the Supreme Court nor the Court of Appeals for the Second Circuit has squarely addressed the question of how to determine the citizenship of a trust for diversity jurisdiction purposes, precedent suggests that a court must look, at least in part, to the citizenship of the trust's trustee or trustees.").

B. A Minority of Courts Consider Other Entities for Citizenship Determination.

A minority of courts hold other parties to a trust are also relevant – or *instead* relevant – for determining the citizenship of a trust. Differing approaches seem to proliferate with each passing year. Amidst the chaos spawned by *Carden*'s *dicta*, lower courts have splintered in different, conflicting directions on the method of determining the citizenship of a trust:

1) Courts Holding Beneficiaries Determine Citizenship

A minority of courts hold a trust's citizenship is determined *not* by reference to its trustees, but instead by the citizenship of the trust's beneficiaries or shareholders.

The Eleventh Circuit adopted this approach in *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (2002). In that case, trustees of a profit sharing plan filed a class action against the operator of a business trust. The court conducted the threshold jurisdictional inquiry, and held that, "like the limited partnership in *Carden*, [the fund trust] is to be treated as a citizen of each state in which one of its shareholders is a citizen." *Id.* at 1339. The court did not look to the citizenship of trustees. Instead, it held diversity was lacking because some of its shareholders resided in Florida and were not diverse. *Id.* ("There was no diversity jurisdiction in suit brought by Florida citizen against business trust since some of the trust's shareholders were Florida citizens.").[7]

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[7] The Eleventh Circuit reiterated this holding in *Bumble Bee Crook-Petite-El v. Bumble Bee Seafoods L.L.C.*, 502 Fed. Appx. 886 (11th Cir. 2012). In that case, a *pro se* individual appealed a District Court dismissal of a tort action as time-barred against an LLC, and the Eleventh Circuit reviewed diversity jurisdiction *sua sponte*. *Id.* at 887. The court restated the rule established in *Riley* that "[c]itizenship of an unincorporated business trust is to be determined on the basis of the citizenship of its shareholders." *Id.* Because the appellant did not allege the identity or citizenship of any of Bumble Bee's

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Some District Courts have adopted this methodology. The District Court for the District of Columbia examined a case between a citizen of Taiwan and a trust, also naming that trust's trustee and beneficiary. *See Yueh-Lan Wang ex rel. Wong v. New Mighty U.S. Trust*, 841 F. Supp. 2d 198 (D.D.C. 2012). The Plaintiff's deceased husband, Yung-Ching Wang, was the second wealthiest person in Taiwan with an estimated net worth of $6.8 billion, and the Plaintiff was suing to establish her right to trust funds as a surviving spouse. *Id.* at 200. The Plaintiff alleged the citizenship of the trust was Virginia and/or the District of Columbia, based on the citizenship of the sole trustee. *Id.* at 203. Defendants contended the citizenship of the trust was that of both the trustees and the beneficiaries. *Id.* The court held that, "[a]lthough it is a close question on which federal courts appear to be divided," it would consider only the beneficiaries' citizenship to determine the citizenship of the trust. *Id.* at 203, 205. *See also, e.g., San Juan Basin Royalty Trust v. Burlington Resources Oil, Gas Co., L.P.*, 588 F. Supp. 2d 1274, 1276 (D.N.M. 2008) ("In this case the Court finds that the citizenship of the Trust's beneficiaries must be taken into account for purposes of determining whether diversity jurisdiction exists.").

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shareholders, the court remanded the case for a diversity determination. *Id.* at 887-88.

2) Courts Holding Beneficiaries *and* Trustees Determine Citizenship

Another group of courts determine the citizenship of a trust by reference to the citizenship of *both* its trustees and beneficiaries. The Third Circuit and several District Courts apply this rule.

In *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192 (3d Cir. 2007), an investment trust invoked diversity jurisdiction to bring a federal action seeking recovery on two unpaid promissory notes and foreclosure of mortgages against a development company. The court examined *Navarro*, *Carden*, and other cases that addressed the citizenship of a trust, concluding the court might determine the citizenship of a trust by selecting among four possible tests: "(a) look to the citizenship of the trustee only; (b) look to the citizenship of the beneficiary only; (c) look to the citizenship of either the trustee or the beneficiary depending on who is in control of the trust in the particular case; or (d) look to the citizenship of both the trustee and the beneficiary." *Id.* at 201. The court held that it must "look to the citizenship of both the trustee and the beneficiary in all cases in which a trust is a party." *Id.* at 203. The Emerald Trust only had a single beneficiary – the British Virgin Islands corporation, Emerald Investors Ltd. – and as such the parties were diverse.

Some District Courts have applied the Third Circuit's rule.[8] In *Mecklenburg Cnty. v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:05CV333, 2010 WL 391279 (W.D.N.C. Jan. 26, 2010), the District Court, *sua sponte*, challenged whether a defendant partnership with a trust in its corporate

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[8] *See, e.g., Mills 2011 LLC v. Synovus Bank*, 921 F. Supp. 2d 219, 226 (S.D.N.Y. 2013) ("The Court finds the decision in *Emerald* well-reasoned and, in light of the Court's conclusion that the Second Circuit has not spoken on the question before it, believes that it states the correct rule regarding the citizenship of trusts for diversity purposes"); *PDP La Mesa LLC v. LaSalle Med. Office Fund II*, No. 10cv1536 DMS (RBB), 2010 WL 3988598, at *3 (S.D. Cal. Oct. 12, 2010) ("The citizenship of both the trustee and the beneficiary should control in determining the citizenship of a trust."); *1963 Jackson, Inc. v. De Vos*, No. 1:10-01206-STA-dkv, 2010 WL 5093354, at *3 (W.D. Tenn. Oct. 8, 2010) ("This court concludes that the 'dual trustee-beneficiary rule' should be applied."); *JP Morgan Chase Bank, N.A. v. Century Trust Co. of Mich.*, No. 10-cv-11877, 2010 WL 2556867, at *2 (E.D. Mich. June 22, 2010) ("The citizenship of a trust is determined by the citizenship of its trustees and its beneficiaries."); *Mecklenburg County v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:05CV333, 2010 WL 391279, at *3 (W.D.N.C. Jan. 26, 2010) ("The Court must conclude as a matter of law that the citizenship of the trustees as well as the beneficiaries must be diverse in order for jurisdiction to lie in this Court."); *Arias v. Budget Truck Tr. I*, No. 09 Civ. 0774 (BMC), 2009 U.S. Dist. LEXIS 18706, at *1-2 (E.D.N.Y Mar. 5, 2009) ("When the citizenship of an unincorporated business entity – there, like defendant here, a business trust – the citizenship of each of its partners, members, or beneficiaries, as the case may be, is imputed to the entity for diversity purposes and must be alleged."); *FMAC Loan Receivable Trust 1997-C v. Strauss*, No. 03 Civ. 2190 (LAK), 2003 WL 1888673, at *2 (S.D.N.Y. Apr. 13, 2003) ("LBR has the citizenship of both its trustee and its beneficiaries.")

structure was diverse. The court recognized "[t]he citizenship of a trust for diversity purposes does not appear to be a settled issue," and cited *Carden* for the proposition that diversity jurisdiction depends on the citizenship of "all the members, the several persons composing such association." *Id.* at *3. The District Court found the reasoning in *Emerald* compelling, holding "it is a complete distortion of reality to argue that the beneficiaries alone constitute the several persons composing such association" because "[w]ithout the trustees, the association – and the trust as a separate business entity – would not exist." *Id.* As such, the court held that the citizenship of trustees *and* beneficiaries must be diverse in order for jurisdiction to be appropriate in that court. *Id.*

Similarly, one judge in the Southern District of New York applied the Third Circuit's rule from *Emerald*. *See Mills 2011 LLC v. Synovus Bank,* 921 F. Supp. 2d 219 (S.D. N.Y. 2013). In that case, Mills challenged the defendant's invocation of diversity jurisdiction because the beneficiary of a trust in its corporate structure was a citizen of Georgia, like the defendant bank. Defendant relied on *Navarro* to argue the citizenship of the Mills trust depended on the citizenship of its trustees, not its Georgia citizen beneficiary. The court acknowledged that "[a] number of Circuit Courts of Appeals have cited *Navarro* for the broad proposition that the citizenship of a trust is determined by its trustees," but Judge Nathan did not think the *Carden* decision supported that holding. *Id.* at 222. The court was persuaded that *Emerald*

"states the correct rule regarding the citizenship of trusts for diversity purposes." *Id.* at 226.

III. This Case Presents a Question of Public Importance that Recurs Frequently.

Because trusts are so commonly involved in business – and thus, business disputes – a clear rule is needed for lower courts to conduct the threshold inquiry into a trust's citizenship for purposes of establishing diversity jurisdiction. Without this Court's intervention, the chaos in the lower courts will only worsen. For the thousands of trusts that are parties to litigation, courts across the country apply different rules to determine a trust's citizenship. The resulting hodge-podge of jurisdictional rules leads to forum-shopping and a fundamental unfairness in the availability of federal jurisdiction to similarly situated parties.

This Court has long held that "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction." *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). The requirement that jurisdiction be "established as a threshold matter" is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1997). Complicated, unclear jurisdictional tests introduce expensive and unnecessary delays in many

of the hundreds of cases filed *every day* in federal courts that invoke diversity jurisdiction.[9]

In the context of trusts and diversity jurisdiction, the most logical and efficient rule is to consider the citizenship of the party-in-interest. The parties-in-interest for a trust are necessarily the trustees. *See, e.g., Watkins v. Trust Under Will of Bullitt ex rel. PNC Bank, N.A.*, No. 3:13-CV-01113-TBR, 2014 WL 2981016 (W.D. Ky. July 1, 2014) ("This Court agrees that the *Carden dictum* remains consistent with the long-held principle that the citizenship of the real party in interest determines the citizenship of the trust, and that for trusts, the real party in interest is the trustee."). Trustees carry out the day-to-day business of the trust, manage the trust, and dispose of its assets. In contrast, beneficiaries of a trust, which can number in the thousands, as seen in *Navarro*, may not even be aware that the trust and/or each other exists. Beneficiaries generally have no control over the trust and no ability to direct its functions. Allowing parties with no control over a trust to determine that trust's citizenship for diversity-jurisdiction purposes would be illogical and unfair.

A common-sense rule like this would also eliminate forum-shopping and the inadvertent unfairness caused in this case by Plaintiffs' decision to sue the trust itself rather than its trustees. If Plaintiffs had

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[9] *See* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table409.pdf>.

named Americold's Trustees as defendants, that would have occasioned a straight-forward application of *Navarro* and a finding of complete diversity of citizenship in this case. By contrast, Plaintiffs' naming of the trust itself occasioned application of a *different* test of citizenship by the Tenth Circuit, which destroyed diversity. It is not difficult, however, to discern that the application of different tests will encourage forum-shopping when opportunistic Plaintiffs want to ensure that litigation remains in particularly friendly state-court jurisdictions of their choice (often before elected judges). *See, e.g. Watkins v. Trust Under Bullit*, 2014 WL at *5.

This case presents a perfect vehicle through which to reject such unfair practices. The instant lawsuit is the *fourth* iteration of a legal dispute that has been mired in the Kansas state court system for nearly *twenty-five years*. Without resort to federal jurisdiction, there is every reason to believe that Americold will be consigned to many years of continuing litigation and possibly need to seek relief from the Kansas Supreme Court for a *fourth* time in this dispute.

Moreover, this is a "clean" vehicle through which to address the operative legal question. It is a pure question of law, and the result turns entirely on *which* test the Court chooses to determine a trust's citizenship: If the citizenship of Americold's beneficiaries or shareholders is considered, there is no complete diversity of citizenship; if only the trustees' citizenship is considered, complete diversity of citizenship

will exist. Further percolation serves no useful purpose. This Court should take this opportunity to resolve a legal issue that has split the lower courts badly – including intra-circuit and intra-district splits – and that is incapable of resolving on its own.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CONAGRA FOODS, INC., formerly known as Conagra, Inc.; SWIFT-ECKRICH, INC., Plaintiffs-Appellants, and KRAFT FOODSERVICE, INC.; SAFEWAY, INC.; PHILLIPS CONNECTIONS, INC., doing business as Phillips Connections and Hanover, Inc., Plaintiffs, v. AMERICOLD LOGISTICS, LLC; AMERICOLD REALTY TRUST, Defendants-Appellees.	No. 13-3277

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. NO. 2:13-CV-02064-JWL-KGS)

(Filed Jan. 27, 2015)

John M. Duggan (Deron A. Anliker and Andrew I. Spitsnogle, with him on the briefs), Duggan Shadwick Doerr & Kurlbaum LLC, Overland Park, Kansas, for Plaintiffs-Appellants.

Michael D. Pospisil (John M. Edgar with him on the briefs), Edgar Law Firm LLC, Kansas City, Missouri, for Defendants-Appellees.

Before **LUCERO**, **MURPHY**, and **McHUGH**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

Is the citizenship of a trust determined by exclusive reference to the citizenship of its trustees? According to *Carden v. Arkoma Associates,* 494 U.S. 185 (1990), the answer to this question is "no." The citizenship of a trust, just like the citizenship of all other artificial entities except corporations, is determined by examining the citizenship "of all the entity's members." *Id.* at 195. That being the case, the district court lacked subject matter jurisdiction over the suit underlying this appeal. This court **remands** the matter to the district court to vacate its judgment on the merits and remand the matter to state court.

II. BACKGROUND

Multiple plaintiffs, including ConAgra Foods, Inc. and Swift-Eckrich, Inc., brought suit in Kansas state court against Americold Logistics, LLC and Americold Realty Trust (the "Americold entities"). The Americold entities removed the case to the United States District Court for the District of Kansas. As the basis for removal, the Americold entities asserted[1] the parties were completely diverse.[2] *See* 28 U.S.C.

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[1] The notice of removal is not part of the record on appeal. "Nevertheless, we have authority to review [that document] because we may take judicial notice of public records, including district court filings." *Guttman v. Khalsa*, 669 F.3d 1101, 1127 n.5 (10th Cir. 2012).

[2] The notice or removal averred as follows:

> 4. Plaintiffs are all incorporated in Delaware.
>
> 5. Americold Realty Trust is a Maryland real estate investment trust. . .
>
> 6. None of the Plaintiffs have their principal place of business in Maryland.
>
> 7. Americold Logistics, LLC is a limited liability company. [F]or purposes of diversity jurisdiction, a limited liability company is treated as a limited partnership. The citizenship of a limited partnership "is deemed to be that of the persons composing such association."
>
> 8. Americold Logistics, LLC is a wholly owned subsidiary of Americold Realty Trust.
>
> 10. Neither Americold Logistics, LLC nor Americold Realty Trust is a citizen of Kansas, the forum state.

§ 1441(b). No party challenged the propriety of removal; the district court did not address the issue. The merits of the suit were submitted to the district court on cross-motions for summary judgment. The district court granted summary judgment to the Americold entities. ConAgra and Swift-Eckrich brought a timely merits appeal.

After the parties filed their merits briefs, this court noted a potential jurisdiction defect in the notice of removal. *See Qwest Corp. v. Pub. Utils. Comm'n of Colo.*, 479 F.3d 1184, 1191 (10th Cir. 2007) (holding this court has "an independent duty to ensure that the district court[ ] properly asserted jurisdiction" (quotation omitted)). We ordered the Americold entities to file a supplemental brief addressing the following two questions:

> 1. Was the [Americold entities'] Notice of Removal sufficient to establish diversity jurisdiction in that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?
>
> 2. If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the [Americold entities] aver to correct this defect in this appeal?

In their supplemental brief, the Americold entities assert the omission of the citizenship of the beneficiaries of Americold Realty Trust from the notice of removal is not a jurisdictional defect because a trust's citizenship is determined exclusively by the

citizenship of its trustees. In support of this assertion, they rely on *Navarro Savings Ass'n v. Lee,* 446 U.S. 458 (1980). They further assert that, although there is a split of authority on this issue, the approach they advocate is the majority position. Finally, they contend this court has, "on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." Appellees' Supplemental Br. at 3 (citing *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1222 n.1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller,* 500 F. App'x 723, 728 n.2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.,* 136 F.3d 1365, 1371 (10th Cir. 1998)). ConAgra Foods and Swift-Eckrich concur in the analysis set out in the Americold entities' supplemental brief.

III. ANALYSIS

Because it is the lynchpin of the parties' arguments in favor of diversity jurisdiction, this court starts with the Supreme Court's decision in *Navarro.* In *Navarro,* trustees of a "business trust," suing in their own names, brought an action in federal district court for breach of contract. 446 U.S. at 459. The defendants disputed the existence of diversity jurisdiction, claiming the beneficiaries were the real parties to the controversy and the citizenship of the beneficiaries, from whom the defendants were not diverse, should control. *Id.* at 459-60. *Navarro* described the controlling question as follows: "[W]hether

the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." *Id.* at 458.

To answer that question, the Court began by recognizing a long-established principle of diversity jurisdiction: "[T]he 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Id.* at 460. The Court also recognized that, with the exception of corporations, "only persons could be real parties to the controversy." *Id.* at 461. Thus, when persons composing an unincorporated association "sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction." *Id.* Nevertheless, the Court noted, *Navarro* did not involve a suit by an unincorporated association. *Id.* at 462. Because the suit was brought by the trustees in their own name, the question was whether the trustees were "real parties to th[e] controversy." *Id.* On that point, the Court identified almost two centuries of precedent dictating "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Id.* at 464.

The trust at issue in *Navarro* gave the trustees exclusive authority over trust property. *Id.* at 459. The declaration of trust "authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of the shareholders, and to sue and be

sued in their capacity as trustees." *Id.* at 464. The shareholders, in contrast, did not have any such authority. *Id.* All this being the case, the Court concluded the trustees in *Navarro* could "sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.* at 465-66.

As noted by the parties in this appeal, several circuits have relied on *Navarro* for the proposition that, for diversity purposes, the citizenship of a trust is based on the citizenship of its trustees. *See, e.g., Mullins v. TestAmerica, Inc.,* 564 F.3d 386, 397 n.6 (5th Cir. 2009); *Johnson v. Columbia Props. Anchorage, L.P.,* 437 F.3d 894, 899 (9th Cir. 2006); *May Dept. Stores Co. v. Fed. Ins. Co.,* 305 F.3d 597, 599 (7th Cir. 2002); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.,* 160 F.3d 925, 931 (2d Cir. 1998). The problem for the parties, however, is that none of these circuits have addressed how the Supreme Court's decision in *Carden* bears on this question. That is, in each of the cases identified above, the court cited uncritically to *Navarro* as establishing that a trust always has the citizenship of its trustees, without regard to whether it was the trust or the trustee that was the party to the suit. As *Carden* makes clear, however, Navarro does not support such a broad proposition. Instead, *Navarro* stands for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries. *Carden,* 494 U.S. at 188 n.1, 191-92. When the trust itself is a party to litigation, however,

the trust's citizenship is derived from the citizenship of all it [sic] members. *Id.* at 192-94.

The question before the Court in *Carden* was the following: "[W]hether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." *Id.* at 186. The answer to that question, according to the Court, depended on two subsidiary questions: whether (1) "a limited partnership may be considered in its own right a 'citizen' of the State that created it"; or (2) a federal court must focus exclusively on a limited partnership's general partners in determining whether complete diversity of citizenship exists. *Id.* at 187. In answering these questions, *Carden* made clear *Navarro* did not in any way address the question of how a court should determine the citizenship of an *entity* that is a party to a lawsuit.

Carden begins its analysis of the first subsidiary question – whether a limited partnership could be considered a citizen of the state that created it – by recognizing the Court had, as a matter of historical anomaly, long treated corporations as citizens of their creator states. *Id.* at 187-88, 196-97. By equally long-standing tradition, however, the Court "just as firmly resisted extending that treatment to other entities." *Id.* at 189. The limited partnership argued, however, that Navarro represented an exception to this rule. The Court rejected this proposition and, in so doing, held Navarro simply did not address the question of how to determine the citizenship of a trust. *Id.* at

191-92. Instead, *Navarro* addressed the far more limited question of "whether parties that were undoubted 'citizens' (viz., natural persons) were the real parties to the controversy." *Id.* at 191. And, in the opening footnote of its opinion, the *Carden* majority made clear that the test for determining whether any particular party had a real interest in the litigation is *not* coextensive with the determination of the citizenship of an artificial entity:

> The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,'" but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because "[a]ll *other parties,* including the general partners and the limited partnership itself, assuming it is a citizen, are diverse."
>
> That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy"

> test. There are *not,* as the dissent assumes, multiple respondents before the Court, but only *one:* the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be determined – which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artificial entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes.

Id. at 187 n.1 (citations omitted).

Having rejected the contention a non-corporate artificial entity could be a citizen in its own right, *Carden* moved on to the question whether the citizenship of such an entity could be determined based on "the citizenship of some but not all of its members." *Id.* at 192. *Carden* answered that question with an emphatic "no." *Id.* at 192-96. The Court again rejected the notion that *Navarro* was relevant to the question:

> To support its approach, Arkoma seeks to press *Navarro* into service once again, arguing that just as that case looked to the trustees to determine the citizenship of the business trust, so also here we should look to the general partners, who have the management powers, in determining the citizenship

> of this partnership. *As we have already explained, however, Navarro had nothing to do with the citizenship of the "trust," since it was a suit by the trustees in their own names.*

Id. at 192-93 (emphasis added). After surveying more than a century of Supreme Court precedent, *Carden* distilled the following rule for determining the citizenship of a non-corporate artificial entity:

> [W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members, the several persons composing such association, each of its members.

Id. at 195-96 (citations and quotations omitted).

The two circuits that have actually grappled with the question of how *Carden* and *Navarro* interact have ultimately determined (1) *Navarro* does not speak to the question of how to determine the citizenship of a trust and (2) *Carden* dictates that the citizenship of any non-corporate artificial entity is determined by considering all of the entity's members. *See Emerald Investors Trust v. Gaunt Parsippany Partners,* 492 F.3d 192, 200-01 (3d Cir. 2007); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 292 F.3d 1334, 1337-40 (11th Cir. 2002), *overruled in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith v. Dabit,* 547 U.S. 71, 89 (2006). The Americold

entities assert, however, this court is bound to accept the majority approach and read *Navarro* as standing for the proposition that the citizenship of a trust is always determined by examining the citizenship of the trustees. In support of this proposition, they say this court has, "on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity." Appellees' Supplemental Br. at 3 (citing *Ravenswood,* 651 F.3d at 1222 n.1; *Sola Salon,* 500 F. App'x at 728 n.2; *Lenon,* 136 F.3d at 1371). None of these three cases support the Americold entities' assertions.

In *Ravenswood,* the parties conceded on appeal that subject matter jurisdiction was lacking because the parties were not completely diverse. 651 F.3d at 1222. The only question in the case was whether the district court had remedied the jurisdictional defect when it severed both claims and parties in the middle of the litigation. *Id.* at 1223. In a footnote, this court concluded it was unnecessary to resolve whether the citizenship of a trust was based on the citizenship of its trustees, beneficiaries, or some combination thereof because "[u]nlike a situation in which both parties erroneously assert federal jurisdiction exists thereby triggering this court's sua sponte obligation to examine its own jurisdiction, there is no need to decide the propriety of the parties' agreement that diversity jurisdiction does not exist because it presents no concern a federal court will exceed its power." *Id.* at 1222 n.1. Accordingly, *Ravenswood* concluded there

was "no occasion in this case to decide if and under what circumstances beneficiaries' citizenship may affect a trust's citizenship for the purposes of the diversity analysis." *Id.*

Sola Salon, an unpublished case with no binding precedential force, 10th Cir. R. App. P. 32.1(a), involved a suit by a trustee in her own name. 500 F. App'x at 725, 727 n.2. That being the case, the rule set out in *Navarro* clearly controls and the decision is of absolutely no relevance to the question whether, when a trust itself is a party to litigation, the trust's citizenship can be determined by considering less than all the trust's members. *Lenon*, also involves a situation in which "the trustees brought suit in their own name in their capacities as trustees of an express trust." 136 F.3d at 1370. Furthermore, the party challenging diversity jurisdiction did "not challenge the trustees' capacity to bring [the] action." *Id.* at 1370 n.2. It is worth noting, however, that *Lenon* recognized the result might well be different if the relevant trusts were parties to the action. *Id.* at 1371 & n.4 (noting the decision in *Carden* might well dictate a different result were the ERISA plans at issue in the case themselves parties to the lawsuit).

Based on the authorities set out above, this court distills the following rule. When a trustee is a party to litigation, it is the trustee's citizenship that controls for purposes of diversity jurisdiction, as long as the trustee satisfies the real-party-in-interest test set out in *Navarro.* When the trust itself is party to the litigation, the citizenship of the trust is derived from

all the trust's "members."[3] That rule does not, standing alone, fully resolve this case because it is necessary to determine which individuals constitute a trust's "membership." The two courts that have considered this question have both determined that, at a minimum, a trust's membership includes the trust's beneficiaries. *Emerald Investors Trust,* 492 F.3d at 205 (concluding both trustees' and beneficiaries' citizenship must be included in determining a trust's citizenship); *Riley,* 292 F.3d at 1338-40 (holding a trust's citizenship is determined solely by reference to the citizenship of the trust's beneficiaries). For those reasons cogently set out by the court in *Emerald Investors Trust,* we conclude any potential definition of the term "members" that is limited to trustees would be inconsistent with the Supreme Court's decision in *Carden*:

> [A] trustee-only rule in an action by the trust itself seems to contradict *Carden* because

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[3] This court need not address the Americold entities' argument that the rule set out in *Carden* is less than fair. As the *Carden* Court noted, the distinctions established in Supreme Court case law between (1) corporations and other artificial entities and (2) the citizenship of an artificial entity and the citizenship of that entity's trustee/limited partner when properly bringing suit in his individual capacity "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organizations." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990). As the Court has made clear, however, any effort to alter the rules clearly laid out in *Carden* must be directed to Congress, rather than to the courts. *Id.* at 196-97.

> that case held that an "artificial entity," a term that we will treat as including a trust, should assume the citizenship of all of its "members." [494 U.S. at 195] The trustee-only rule may contravene *Carden* because it disregards the citizenship of the trust's beneficiary who may be in a position similar to that of the limited partners in a limited partnership.

492 F.3d at 202. Given the unique facts of this case, it is unnecessary to go any further and determine whether a trust's membership also includes its trustees. When Americold Realty Trust's beneficiaries are considered, the record does not establish that either of the Americold entities was completely diverse from ConAgra or Swift-Eckrich at the time of the filing of the complaint in Kansas state court. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004); 28 U.S.C. §§ 1332(a), 1441(a) Thus, this court leaves for another day, when the issue is properly briefed and its disposition will have an impact on the outcome of the case, the question whether a trust's membership includes, in addition to its beneficiaries, its trustees.

IV. CONCLUSION

The Americold entities have failed to carry their burden of demonstrating the existence of diversity jurisdiction. *Full Life Hospice, LLC v. Sebelius,* 709 F.3d 1012, 1016 (10th Cir. 2013) ("[B]ecause the jurisdiction of federal courts is limited, there is a

presumption against [federal] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." (quotation omitted)).[4] In response to this court's request for supplemental briefing, the Americold entities declined to offer any evidence as to the citizenship of the beneficiaries of Americold Realty Trust, instead choosing to rely exclusively on their assertion that the trust's citizenship was derived solely from the citizenship of its trustees. Thus, the record fails to establish Americold Realty Trust is not a citizen of Delaware, Nebraska, or Illinois, the states of which ConAgra and Swift-Eckrich are citizens. *See* 28 U.S.C.A. § 1332(c)(1). This same evidentiary deficiency impacts the citizenship of Americold Logistics, LLC. As the Americold entities recognize, the citizenship of Americold Logistics, LLC is determined by reference to its sole owner, Americold Realty Trust. *See supra* n.2. Furthermore, because the parties were given a full opportunity by this court to demonstrate the citizenship of Americold Realty Trust by reference to its beneficiaries, there is no need for further proceedings on remand. Accordingly, this court **REMANDS** this case to the district court to vacate its judgment on the merits and remand the matter to state court.

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[4] At oral argument, ConAgra Foods and Swift-Eckrich conceded federal jurisdiction was lacking should this court determine it must consider the citizenship of Americold Realty Trust's beneficiaries in determining the citizenship of Americold Realty Trust.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC., f/k/a Conagra, Inc.; SWIFT-ECKRICH, INC.,

Plaintiffs-Appellants,

and

KRAFT FOODSERVICE, INC.; SAFEWAY, INC.; PHILLIPS CONNECTIONS, INC., d/b/a Phillips Connections and Hanover, Inc.,

Plaintiffs,

v.

AMERICOLD LOGISTICS, LLC; AMERICOLD REALTY TRUST,

Defendants-Appellees.

No. 13-3277
(D.C. No. 2:13-CV-02064-JWL-KGS)
(D. Kan.)

ORDER

(Filed Apr. 9, 2015)

Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

This matter is before the court, *sua sponte,* to amend the Opinion issued originally on January 27, 2015. The amendment is limited to a single sentence in the conclusion of the decision at page 15. A copy of the new Opinion is attached to this Order, and the clerk of court is directed to file the amended decision *nunc pro tunc* to the original filing date.

As directed in our order dated March 23, 2015, issuance of the mandate is stayed until June 22, 2015, and if a petition for writ of certiorari is filed, will continue to be stayed until the Supreme Court's final disposition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al., Plaintiffs-Appellants, and KRAFT FOODSERVICE, INC., et al., Plaintiffs, v. AMERICOLD LOGISTICS, LLC, et al., Defendants-Appellees.	No. 13-3277 (D.C. No. 2:13-CV-02064-JWL-KGS) (D. Kan.)

ORDER

(Filed Mar. 23, 2015)

Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

This matter is before the court on appellees' motion to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.

We also have the response filed by the appellants. Upon consideration, the motion is granted.

Issuance of the mandate is stayed until June 22, 2015. If a notice from the Supreme Court clerk is filed with this court during the stay period indicating the appellees have filed a petition for certiorari, the stay will continue until the Supreme Court's final disposition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al., Plaintiffs-Appellants, and KRAFT FOODSERVICE, INC., et al., Plaintiffs, v. AMERICOLD LOGISTICS, LLC, et al., Defendants-Appellees.	No. 13-3277

ORDER

(Filed Oct. 7, 2014)

This matter is before the Court *sua sponte* at the direction of the panel of judges who will hear and decide the merits of this appeal. The Appellee is directed, within 10 days of the date of this order, to file supplemental briefing addressing the following questions:

1. Was the Defendants' Notice of Removal sufficient to establish diversity jurisdiction in

that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?

2. If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the appellee aver to correct this defect in this appeal?

The supplemental brief shall be no longer than 20 pages in a 13-point font, and should be filed via the court's ECF system. No hard copies need be filed.

The Appellant may file a response brief not exceeding 20 pages within 7 days of service of the supplemental brief.

Entered for the Court

ELISABETH A. SHUMAKER,
Clerk

/s/ Chris Wolpert
by: Chris Wolpert
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Conagra Foods, Inc.
f/k/a Conagra, Inc.;
Swift-Eckrich, Inc.;
Kraft Foodservice, Inc.;
Safeway, Inc.; and
Phillips Connections, Inc.
d/b/a Phillips Connections
and Hanover, Inc.,

Case No. 13-2064-JWL

Plaintiffs,

v.

Americold Logistics, LLC;
and Americold Realty
Trust,

Defendants.

MEMORANDUM & ORDER

(Filed Oct. 4, 2013)

Plaintiffs filed a petition in state court asserting claims for breach of contract and specific performance arising out of defendants' refusal to execute Stipulations of Revivor after the Kansas Supreme Court ruled that plaintiffs' underlying judgments against defendants' predecessor were extinguished. Defendants removed the case on the basis of diversity jurisdiction. Shortly thereafter, defendants filed a motion to dismiss plaintiffs' petition on various grounds. In May 2013, the court held a hearing on the motion to dismiss during which defendants agreed to

withdraw their motion and the parties agreed that the issues were best resolved in the context of cross-motions for summary judgment. The parties further agreed that no discovery was necessary (and none was conducted) and have stipulated to all but a handful of the pertinent facts. This matter, then, is now before the court on the parties' cross-motions for summary judgment (doc. 35 and 37). As will be explained, plaintiffs' motion is denied and defendants' motion is granted.

Standard

"Summary judgment is appropriate if the pleadings, depositions, other discovery materials, and affidavits demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Water Pik, Inc. v. Med-Systems, Inc.*, ___ F.3d ___, 2013 WL 4046470, at *4 (10th Cir. Aug. 12, 2013) (quotation omitted); *see* Fed. R. Civ. P. 56(a). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Water Pik, Inc.*, ___ F.3d at ___; 2013 WL 4046470, at *4 (quotation omitted). The nonmoving party is entitled to all reasonable inferences from the record; but if the nonmovant bears the burden of persuasion on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue. *Id.*

The fact that the parties here have filed cross-motions for summary judgment does not change the legal standard. Each party has the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. *Atlantic Richfield Co. v. Farm Cr. Bank,* 226 F.3d 1138, 1148 (10th Cir. 2000). "[C]ross-motions for summary judgment are to be treated separated [sic]; the denial of one does not require the grant of another." *Ultra Clean Holdings, Inc. v. TFG-California, L.P.,* ___ Fed. Appx. ___, at *3 (10th Cir. Aug. 21, 2013) (quoting *Buell Cabinet Co. v. Sudduth,* 608 F.2d 431, 433 (10th Cir. 1979)). "And when the parties file cross-motions for summary judgment, the court is entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *Id.* (quoting *Atlantic Richfield,* 226 F.3d at 1148).

Facts

The following facts have either been stipulated by the parties in the parties' joint stipulation of facts (doc. 30) or are related in the light most favorable to the nonmoving party. In December 1991 a fire started in an underground storage facility generally known as 6500 Inland Drive in Kansas City, Kansas. The facility was owned and operated by Americold Corporation. Defendant Americold Logistics, LLC, a wholly owned subsidiary of defendant Americold Realty Trust, is the legal successor to Americold Corporation.

Defendants Americold Logistics, LLC and Americold Realty Trust will be referred to collectively as "Americold."

Plaintiffs ConAgra Foods, Inc. f/k/a/ ConAgra, Inc.; Swift-Eckrich, Inc.; Kraft Foodservice, Inc.; Safeway, Inc.; and Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. leased space for storage of food products in Americold's underground facility. Plaintiffs filed lawsuits against Americold Corporation in 1992 seeking damages for their lost and contaminated products. Plaintiffs' cases were consolidated into *Associated Wholesale Grocers et al. v. Americold Corporation et al.*, Case No. 92C4015 in the District Court of Wyandotte County, Kansas (the "Kansas Action"). Americold Corporation was insured under a policy of commercial excess liability insurance issued by Northwestern Pacific Indemnity Company (NPIC) with limits of $25,000,000. NPIC denied coverage for the claims under the policy's pollution exclusion because NPIC claimed the damages had been caused by toxic smoke. On March 10, 1994, a settlement was reached between Americold Corporation and plaintiffs, along with other claimants against Americold Corporation that are not parties to the present action.

The Settlement Agreement provided for the entry of consent judgments in favor of the plaintiffs and a covenant not to execute by plaintiffs on the personal assets of Americold Corporation. The Settlement Agreement included an assignment by Americold Corporation to plaintiffs of Americold Corporation's

right to seek recovery of insurance policy proceeds and amounts in excess of policy limits from excess carriers including NPIC. As partial consideration for Americold Corporation agreeing to settle the dispute "and in recognition of Americold's interest in protecting its personal assets," plaintiffs agreed that they would seek to satisfy their judgments against Americold Corporation "by execution, garnishment or otherwise as provided by law against the liability insurance identified" in the Settlement Agreement. Settlement Agreement at ¶ 11.3. Americold Corporation agreed to "execute any additional documents necessary to effectuate the purpose and intent of [the Settlement Agreement] or to pursue the assigned claims or execute on the judgments obtained by plaintiffs." *Id.* ¶ 14.1. Pursuant to the Settlement Agreement, consent judgments were entered in favor of plaintiffs and against Americold Corporation. NPIC is not a party to the Consent Judgments.

On March 15, 1994, NPIC filed a declaratory judgment action in the District Court of Johnson County, Kansas against Americold Corporation and plaintiffs in the Kansas Action. The action sought a declaration that (1) the NPIC policy issued to Americold Corporation provided no coverage; (2) NPIC had no duty to defend or indemnify Americold Corporation for the pending lease claims; and (3) if any coverage existed, it was excess to any covered [sic] available to Americold Corporation under the tenant liability policies. This action was transferred to the District Court of Wyandotte County and consolidated

into the Kansas Action. In September 1994, after the Consent Judgments were entered in favor of plaintiffs in the Kansas Action, plaintiffs in the Kansas Action commenced garnishment proceedings against NPIC and TIG Insurance Company.

After extensive discovery in the garnishment action, a ten-week trial took place which terminated on November 15, 2005. Plaintiffs did not file renewal affidavits, file requests for the issuance of additional garnishments, or file motions to revive the Consent Judgments with the District Court of Wyandotte County, Kansas. On November 14, 2005, NPIC filed a Request to the Clerk of Court pursuant to K.S.A. § 60-2403(a) to Release Judgments of Record. The Wyandotte County Clerk released the 1994 Consent Judgments in November 2005. NPIC then moved to dismiss the garnishment proceedings on the grounds that the district court lacked subject matter jurisdiction to conduct the garnishment proceedings. On January 19, 2006, the district court entered its journal entry denying NPIC's motion to dismiss. In that order, the district court determined that "the action of the Clerk of the District Court of Wyandotte County, Kansas in extinguishing these judgments pursuant to K.S.A. 60-2403 was in error based upon the court's ruling herein and is set aside and determined to be void ab initio." On or about August 27, 2007, separate journal entries of judgment were entered against NPIC and in favor of plaintiffs (the "NPIC Judgments").

NPIC appealed the district court's January 19, 2006 decision and the Kansas Supreme Court reversed that decision. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 270 P.3d 1074 (Kan. 2011) (*Americold III*). In so deciding, the Kansas Supreme Court wrote:

> [W]e hold that when the district court entered its judgment against NPIC in this garnishment proceeding, the Plaintiffs' underlying consent judgments against Americold had been extinguished by operation of the dormancy and revivor statutes, K.S.A. 60-2403 and K.S.A. 60-2404. Because Americold was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold under its contract to pay the judgments for which Americold was legally liable.

Id. at 1083. The Kansas Supreme Court, then, remanded the matter to the district court to dismiss without prejudice the garnishment proceedings. Thereafter, the district court dismissed the garnishment action and vacated the judgments in favor of plaintiffs and against NPIC.[1]

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[1] Plaintiffs assert in their factual statement that NPIC, a non-party to the Consent Judgments, lacked standing to request that the Consent Judgments be released of record. The court, however, does not read plaintiffs' submissions as raising that particular argument here and, in fact, plaintiffs could not assert that argument here.

After the decision in *Americold III*, plaintiffs made demand on Americold to execute Stipulations of Revivor pursuant to K.S.A. § 60-2404, asserting that Americold was contractually obligated to execute those Stipulations under ¶ 14.1 of the parties' Settlement Agreement in the Kansas Action. Americold refused the demand and this lawsuit followed.

Additional facts will be provided as they relate to the specific arguments asserted by the parties in their submissions.

Discussion

Plaintiffs and Americold move for summary judgment on plaintiffs' specific performance and breach of contract claims.[2] Those claims are based on

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[2] In addition to their breach of contract and specific performance claims, plaintiffs assert in their petition separate claims for breach of the duty of good faith and fair dealing; promissory estoppel; and equitable estoppel. Americold has moved for summary judgment on these claims. Plaintiffs have not mentioned these claims either in their own motion for summary judgment or in response to Americold's motion. The court presumes, then, that plaintiffs have abandoned these claims and grants summary judgment in favor of Americold. *Maestas v. Segura*, 416 F.3d 1182, 1190 n.9 (10th Cir. 2005) (plaintiffs abandoned claims "as evidenced by their failure to seriously address them in their briefs"); *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 768-70 (10th Cir. 2001) (affirming district court's grant of summary judgment in favor of defendant on certain claims after concluding that plaintiff had abandoned those claims by failing to address them in response to the

(Continued on following page)

Americold's alleged breach of paragraph 14.1 of the parties' Settlement Agreement in the Kansas Action. That paragraph provides:

> Americold agrees that it will make available to Plaintiffs all evidence, not privileged, that relates to Plaintiffs' pursuit of claims assigned in Sections 8 and 9 of this Agreement and will cooperate with Plaintiffs. Americold will execute any additional documents necessary to effectuate the purpose and intent of this Agreement or to pursue the assigned claims or execute on the judgments obtained by Plaintiffs.

On its face, then, paragraph 14.1 contemplates the use of an objective standard in determining whether a particular document is "necessary" to achieve plaintiffs' purposes; plaintiffs may not simply demand the execution of any additional document that they subjectively believe is necessary. Similarly, Americold cannot refuse to sign a document that it subjectively believes is unnecessary to achieve plaintiffs' purposes. None of the parties here contends otherwise.

According to plaintiffs, Americold breached paragraph 14.1 of the parties' agreement by refusing to execute Stipulations of Revivor that would enable plaintiffs to execute on the Consent Judgments. Plaintiffs contend that Americold's refusal has

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defendant's motion for summary judgment) (citing *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992)).

prevented plaintiffs from recovering from NPIC the amount of the judgments against Americold such that plaintiffs have sustained more than $35 million in damages. Americold, in turn, contends that plaintiffs' claims fail because a Stipulation of Revivor is meaningless in light of the Kansas Supreme Court's ruling in *Americold III* that the Consent Judgments have been extinguished and, accordingly, cannot be revived in any event.

In their motions for summary judgment, then, the parties recognize that plaintiffs' claims rise or fall depending on whether the Consent Judgments can be revived by stipulation at this juncture. Plaintiffs urge that K.S.A. § 60-2404 permits the revival of a judgment by stipulation at any time after dormancy. Americold contends that a judgment, once extinguished, simply cannot be revived, even by stipulation. As will be explained, the court concludes that plaintiffs cannot establish that Americold breached any obligations under ¶ 14.1 because, as a matter of law, a Stipulation of Revivor is not "necessary" to plaintiffs' ability to execute upon the Consent Judgments against NPIC. Indeed, because the Kansas Supreme Court in *Americold III* held that the Consent Judgments were "extinguished," a Stipulation of Revivor is but a nullity – utterly useless to plaintiffs' efforts to effectuate the purpose and intent of the parties' settlement agreement in the Kansas Action, to pursue the assigned claims or to execute on the judgments. *See Clark v. Glazer,* 4 Kan. App. 2d 658, 661 (1980) ("By virtue of the statute, after seven

years of inaction by plaintiff her judgment was extinguished, and . . . this declaratory judgment action cannot be used to revive a judgment long dead."). Summary judgment, then, is warranted in favor of Americold and against plaintiffs on their claims.[3]

The court begins its analysis by reviewing the relevant provisions of the dormancy and revivor statutes. Pursuant to K.S.A. § 60-2403, a judgment becomes dormant after five years if a renewal affidavit is not filed or if an execution, including any garnishment proceeding, is not issued. Significantly, § 60-2403 also states that "When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the clerk of the court to release the judgment of record when requested to do so." Deleting the portions applicable to child support judgments, the revivor provisions of K.S.A. § 60-2404 are as follows:

> A dormant judgment may be revived and have the same force and effect as if it had not become dormant if the holder thereof files a motion for revivor and files a request for the immediate issuance of an execution thereon

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[3] The court declines to address Americold's alternative arguments in support of its motion for summary judgment, including its arguments concerning the doctrines of impossibility and frustration of purpose; that plaintiff's claims are barred by the statute of limitations and/or the doctrine of res judicata; that any damages sustained by plaintiffs were caused by plaintiffs' own inaction; and that Americold has fulfilled its contractual obligations.

> if such motion is granted. Notice of the filing of the motion shall be given as for a summons under article 3 of this chapter. If the motion for revivor was filed within two years after the date on which the judgment became dormant . . . , on the hearing thereof the court shall enter an order of revivor unless good cause to the contrary be shown, and thereupon the execution shall issue forthwith. . . . A judgment may also be revived by the filing of a written stipulation of revivor signed by all of the parties affected thereby. For the purpose of this section, . . . any attachment or garnishment process shall have the same effect as the issuance of an execution."

K.S.A. § 60-2404. When viewed together, the dormancy and revivor statutes permit a party to revive a dormant judgment at any time within two years of the date on which such judgment became dormant. *Johnson Bros. Wholesale Liquor Co. v. Clemmons,* 233 Kan. 405, 407 (1983). After that revivor period, a judgment is released pursuant to § 60-2403 and cannot be revived. *See O'connor v. Midwest Pipe Fabricators, Inc.,* 198 F. Supp. 2d 1275, 1278 (D. Kan. 2002) ("When a judgment remains dormant for two years, the judgment is released and may not be revived."); *Long v. Brooks,* 6 Kan. App. 2d 963, 966 (1981) (If a dormant judgment is not revived, it becomes "absolutely extinguished and unenforceable two years thereafter . . . and once the period for revivor passes, there is absolutely nothing left of that

judgment to which even 'equitable principles' could be applied.").

In *Ameriold III,* the Kansas Supreme Court applied the dormancy and revivor statutes to the Consent Judgments at issue here. 270 P.3d 1074 (2011). In that case, NPIC argued that the underlying judgments had become "extinguished" pursuant to K.S.A. § 60-2403 and the Kansas Supreme Court found in favor of NPIC on that issue. *Id.* at 1076, 1083. According to the Court, the consent judgments, under K.S.A. § 60-2403, became dormant in January 2000, five years after the last garnishment was issued. *See Americold III,* 270 P.3d at 1080. The Supreme Court, however, also held that the dormant judgments were "extinguished" because they had not been revived by plaintiffs within two years of dormancy. *See id.* at 1080, 1083. In so holding, the Court reiterated that the dormancy and revivor statutes are distinguished from ordinary statutes of limitation and that they demand "strict compliance and allow for no exceptions." *Id.* at 1082. Because the Consent Judgments were extinguished and unenforceable, the Court held that the district court lacked subject matter jurisdiction to enter a judgment in favor of plaintiffs against NPIC as garnishees and even recognized that the parties could not confer subject matter jurisdiction "by consent." *Id.* at 1079, 1083.

Nonetheless, plaintiffs argue that the filing of a stipulation of revivor is a separate and distinct method of reviving a judgment within K.S.A. § 60-2404 that on its face permits revivor at any time after

dormancy. Plaintiffs note that the provision for the filing of stipulation of revivor is set apart from the provision requiring a motion for revivor within two years after dormancy. Plaintiffs' interpretation of the pertinent statutes is not persuasive to the court. To begin, K.S.A. § 60-2404 plainly applies, as its title dictates, to the "Revivor of [a] Dormant Judgment." By definition, a "dormant" judgment is one that has not been extinguished by lapse of time. Black's Law Dictionary 339 (Abridged 6th ed. 1990). Dormancy can be cured through revival. *Id.*; *First National Bank of Norton v. Harper,* 169 P.2d 844, 845-46 (1946). But a dormant judgment that is not revived within the statutory period "dies." *First National Bank,* 169 P.2d at 846. Pursuant to *Americold III,* the Consent Judgments here are not dormant such that they can be revived under K.S.A. § 60-2404. The Consent Judgments have been "extinguished," 270 P.3d at 1083, and plaintiffs' argument fails to come to grips both with the *Americold III* decision itself (in which the Court recognized that because the judgments were unenforceable, the court lacked subject matter jurisdiction could not be conferred "by consent") and with the critical distinction between dormant and extinguished judgments. Because the Consent Judgments have been extinguished and released of record, they are not subject to revivor under any method set forth in K.S.A. § 60-2404. *See Americold III,* 270 P.3d at 1079 (recognizing that if the judgments are unenforceable, then the parties "cannot confer subject matter jurisdiction on the district court by consent, waiver, or estoppel"); *Long*

v. Brooks, 6 Kan. App. 2d 963, 966 (1981) (If a dormant judgment is not revived, it becomes "absolutely extinguished and unenforceable two years thereafter . . . and once the period for revivor passes, there is absolutely nothing left of that judgment to which even 'equitable principles' could be applied."); *Clark v. Glazer,* 4 609 P.2d 1177, 1178-80 (Kan App. 1980) (By virtue of K.S.A. 60-2403 and 60-2404, plaintiff's judgment became "dormant," and then "barred" two years later; a declaratory judgment action could not be used to revive the judgment indirectly "when it could not be revived directly;" the judgment was "long dead").

Moreover, plaintiffs' interpretation of K.S.A. § 60-2404 fails to consider that statute in conjunction with K.S.A. § 60-2403 and the two statutes must necessarily be read together. *Americold III,* 270 P.3d at 1079-80. K.S.A. § 60-2403 plainly provides for a finite dormancy period of two years regardless of the method of revivor utilized: "When a judgment becomes and remains dormant for a period of two years, it shall be the duty of the judge to release the judgment of record when requested to do so." Modern cases support the conclusion that revival of a judgment must occur, if at all, within the two-year period for revivor. *See Cyr v. Cyr,* 815 P.2d 97, 100 (Kan. 1991) ("Once a judgment grows dormant, however, and is not revived pursuant to K.S.A. 60-2404, it becomes absolutely extinguished and unenforceable."); *State v. Douglas,* 279 P.3d at 740-41 (If a dormant judgment is not revived "as provided in K.S.A. 60-2404, such dormant

judgments become absolutely extinguished and unenforceable two years thereafter."); *Gardner v. Gardner,* 916 P.2d 43, 45 (Kan. App. 1996) ("A dormant judgment cannot be revived if it remains dormant for a specified period of time."); *Clark v. Glazer,* 4 609 P.2d 1177, 1178-80 (Kan App. 1980) (By virtue of K.S.A. § 60-2403 and § 60-2404, plaintiff's judgment became "dormant," and then "barred" two years later; a declaratory judgment action could not be used to revive the judgment indirectly "when it could not be revived directly;" the judgment was "long dead").[4]

Plaintiffs urge that their interpretation of the Stipulation of Revivor provision of K.S.A. § 60-2404 is consistent with the legislative history of the statute dating back to the mid- to late 1800s, when Kansas courts, drawing an analogy to the revivor of actions upon a defendant's death, recognized that dormant judgments could be revived by consent despite the fact that the Kansas General Statutes of 1868 did not expressly provide for the revivor of dormant judgments by consent. *See, e.g., Halsey v. Van Vliet,* 27 Kan. 476, 479 (1882). For two reasons, these early cases are not persuasive to the court. First, these

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[4] Plaintiffs have not directed the court to any case permitting an extinguished judgment to be revived under any circumstance. While it is true that there are no cases whatsoever specifically addressing the filing of a "stipulation of revivor under K.S.A. § 60-2404, these cases compel the conclusion that a two-year revivor period exists regardless of the method of revivor.

cases address dormant judgments rather than extinguished judgments. Second, to the extent those cases suggest that a dormant judgment could be revived by consent after the expiration of the prescribed dormancy period, the Kansas Legislature clarified that issue by virtue of a 1909 amendment stating that "If a judgment becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment at any time within two years after it becomes dormant." *See Harvey v. Wasson,* 136 P. 919, 919 (Kan. 1913). By 1945, the General Statutes reflected that a dormant judgment, after two years of dormancy, was "barred" and was required to be released by the clerk of the court. *See* G.S. 1945 § 60-3405. These rules continue to adhere today.

Finally, plaintiffs contend that Americold, under principles of estoppel, cannot now dispute its obligations to plaintiff under the Settlement Agreement because it represented to the district court in the garnishment proceedings that plaintiffs "are entitled to recover from garnishes the amount of all judgments against Americold." Even assuming that plaintiffs came forward with facts establishing the elements of judicial estoppel, *see McClintock v. McCall,* 522 P.2d 343, 346 (Kan. 1974), the Kansas Supreme Court has recognized, in the context of this very case, that once a judgment has been extinguished, there is "nothing left to which equitable principles could be applied." *Americold III,* 270 P.3d at 1082-83 (rejecting plaintiffs' argument that NPIC waived the dormancy defense by failing to appropriately plead it) (citing

Clark v. Glazer, 609 P.2d 1177 (Kan. App. 1980)). Indeed, the Court in Americold III expressly emphasized that because the judgments were unenforceable, the district court lacked subject matter jurisdiction to enter a judgment against NPIC and the parties "cannot confer subject matter jurisdiction on the district court by consent, waiver or estoppel." *Id.* at 1079.

For the foregoing reasons, a Stipulation of Revivor cannot revive the Consent Judgments because those Consent Judgments, as held by the Kansas Supreme Court in *Americold III*, have been extinguished and released. Because a Stipulation of Revivor, then, is not "necessary" to plaintiff's efforts to execute on those judgments, Americold has not breached ¶ 14.1 of the parties' Settlement Agreement in the Kansas Action.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion for summary judgment (doc. 35) is granted and plaintiffs' motion for summary judgment (doc. 37) is denied.

IT IS SO ORDERED.

Dated this 4th day of October, 2013, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC., f/k/a Conagra, Inc., et al., Plaintiffs-Appellants, and KRAFT FOODSERVICE, INC., et al., Plaintiffs, v. AMERICOLD LOGISTICS, LLC, et al., Defendants-Appellees.	No. 13-3277

ORDER

(Filed Feb. 23, 2015)

Before **LUCERO, MURPHY,** and **McHUGH,** Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

NO. 13-3277

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

CONAGRA FOODS, INC. F/K/A CONAGRA, INC., et al.,
Plaintiffs-Appellants,
v.
AMERICOLD LOGISTICS, LLC, et al.,
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
The Honorable John W. Lungstrum
District Judge
District Court Case No.
2: 13-cv-02064-JWL/KGS

SUPPLEMENTAL BRIEF OF APPELLEES AMERICOLD LOGISTICS, LLC and AMERICOLD REALTY TRUST

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[1] Appellees Americold Logistics, LLC and Americold Realty Trust respectfully submit this Brief in response to the Court's October 7, 2014, Order.

As explained in greater detail below, federal diversity jurisdiction exists in this case. The parties to this appeal are completely diverse empowering this Court to hear and determine the merits of Appellants' Appeal.

I. The Notice of Removal is Not Defective

The Court's first question asks: "Was the Defendants' Notice of Removal sufficient to establish diversity jurisdiction in that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?

* * *

The Notice of Removal was not deficient. The Notice did not identify the citizenship of the beneficial owners or shareholders of the Americold Realty

Trust for the simple reason that United States Supreme Court authority makes clear it is the citizenship of a Trust's trustees that determines the issue of diversity. Admittedly, the Notice does not identify the citizenship of the trustees. However, as noted in response to the Court's second question, that can – and is herein – easily cured.

In *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980), the United States Supreme Court concluded the citizenship of a real estate investment trust is [2] determined solely by the citizenship of its trustees. The Court rejected the argument that the citizenship of the Trust was determined by the location of the "9,500 beneficial shareholders." *Id.* at 464. Instead, the Court looked at the trustees of the trust because they had complete authority over the actions and business of the trust:

> In short, [the Trustees] are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right, without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today.

Id. at 465-464 [sic]. The Court therefore looked at the citizenship of the trustees as opposed to the beneficiaries of the trust. In doing to, the Court held "[t]he residence of those who may have an equitable interest is simply irrelevant" for purposes of determining whether diversity exists. *Id.* at 463 (quoting *Bonnafee v. Williams,* 44 U.S. (3. How.) 574, 577 (1845)); *see also*

Id. at 464 (citizenship of trust beneficiaries is "immaterial" to jurisdictional analysis) (quoting *Bullard v. Cisco,* 260 U.S. 179, 190 (1933)).

Navarro is hardly a novel model for determining citizenship of a trust. The locale of trust beneficiaries has long been deemed irrelevant by the Supreme Court. *Id.* at 462-463 (citing *Chappedelaine v. Dechenaux,* 4 Cranch 306, 308, 2 L.Ed. 629 (1808); *Coal Co. v. Blatchford,* 11 Wall. 172, 177, 20 L.Ed. 179 (1879); [3] *Bonnafee v. Williams,* 3 How. 574, 577, 11 L.Ed. 732 (1845)). The Tenth Circuit has, on at least three occasions, indicated that under *Navarro,* where a trustee actively controls a trust, the trustee's citizenship controls for purposes of diversity. *See, e.g. Ravenswood Investment Co., L.P. v. Avalon Correctional Services,* 651 F.3d 1219, 122 n. 1 (10th Cir. 2011); *Sola Salon Studios, Inc. v. Heller,* 500 Fed.Appx. 723, 728 n. 2 (10th Cir. 2012) (unpublished); *Lenon v. St. Paul Mercury Ins. Co.,* 136 F.3d 1365, 1371 (10th Cir. 1998) (all citing *Navarro*). Courts in almost all of the other Circuits have concurred. *See, e.g. Mullins v. TestAmerica, Inc.,* 564 F.3d 386 (5th Cir. 2009) (stating that the "citizenship of a trust is that of its trustee"); *Johnson v. Columbia Properties Anchorage, L.P.,* 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *May Department Stores Co. v. Federal Ins. Co.,* 350 F.3d 597 (7th Cir. 2002) ("[F]or diversity purposes a trust is a citizen of whatever state the trustee is a citizen of"); *E.R. Squibb & Sons, Inc. v. Accident & Casualty Ins. Co.,* 160 F.3d 925, 931 (2nd Cir. 1998).

The few Circuits that look at the citizenship of trust beneficiaries in determining diversity do so based on a misreading of the Supreme Court's decision in *Carden v. Arkoma Associates,* 494 U.S. 185 (1990). *See, e.g. Emerald Investors Trust v. Gaunt Pasippany Partners,* 492 F.3d 192 (3rd Cir. 2007). *Carden* examined whether the citizenship of limited partners must be considered in [4] analyzing whether diversity jurisdiction exists over a limited partnership. *Id.* at 205-207. The case did not involve a trust of any sort. As one court recently noted, because *Carden* did not concern trusts, "necessarily anything it might have had to say about diversity jurisdiction would be at best *dictum.*" *In re Mortgages Ltd.*, 452 B.R. 776, 779 (D. Ariz. 2011). *See also Watkins v. Trust Under Will of Litt,* No. 3:13-CV-1113, 2014 WL 2981016 at *5 (W.D. Ky., July 1, 2014) ("This Court agrees that the *Carden dictum* remains consistent with the long-held principle that the citizenship of the real party in interest determines the citizenship of the trust, and that for trusts, the real party in interest is the trustee.")

Americold's Trustees are not named parties in this action, but that makes no difference to the application of *Navarro's* clear holding. First, there is nothing in *Navarro* to suggest the case would have turned out differently had the trust, as opposed to the trustee, been named as a party. Indeed, courts all across the country have routinely applied the *Navarro* diversity analysis in cases where the trust – as opposed to the individual trustees – is the named party.

Goldstick v. ICM Realty, 788 F.2d 456,458 (7th Cir. 1986) (the trustees were not parties, but that did not matter because "[t]he citizenship of a trust is determined for purposes of diversity jurisdiction by the citizenship of the trustee or, in this case, trustees. . . ."); *Watkins,* 2014 WL 2981016 at *4 (same); *In re Mortgages Ltd.,* 452 B.R. at 781 ("The fact that the trust itself is the named party does not change 150 years of [5] Supreme Court jurisprudence concluding that for real, express trusts, the trustee rather than the beneficiaries is the real party in interest, on whose citizenship the existence of diversity jurisdiction must be found.")

Second, this action was removed to federal court. The two Americold Defendants were chosen by Plaintiffs. They chose to sue Americold Realty Trust as opposed to its Trustees. Application of *Navarro* in this procedural posture is particularly appropriate to preclude even the possibility of forum shopping. In denying a motion to remand a lawsuit brought against a trust – as opposed to the trustees – the court in *Watkins,* provided rationale that applies equally here:

> [R]egardless of who the named plaintiff is, the trustee is the one with the authority to hold, manage and dispose of assets, as well as make decisions on behalf of the trust, and is therefore the real party to the action. As such, when considering whether diversity jurisdiction exists, the citizenship of the trust should be determined by the citizenship of its trustee or trustees only. This rule has the additional benefit of discouraging forum

> shopping by plaintiffs who can decide whether to sue in the name of the trust or trustees.

2014 WL 2981016 at *3 (quoting *Gen. Retirement Sys. Of the City of Detroit v. UBS AG,* 2010 WL 5296957 at *4 (E.D. Mich. Dec. 20, 2010)).

Like the trust at issue in *Navarro* and the other cases discussed above, [6] Americold Realty Trust is also controlled by a Board of Trustees (hereafter "Trustees"). As noted in the attached Declaration of Mr. Todd N. Sheldon, Executive Vice President and Secretary at Americold Realty Trust, the Trustees hold, manage, control and dispose of the Trust Assets for the benefit of the Trust Owners. Sheldon Declaration (Exhibit A) at ¶ 5. Indeed, the Trustees have "full, exclusive and absolute power, control and authority over any and all property of [Americold Realty Trust]." *Id.* at ¶ 7. As such, the citizenship of Americold Realty Trust is determined by the citizenship of its individual Trustees. Mr. Sheldon's Declaration explains at the time this lawsuit was filed, decided below, and up until today, there were seven Trustees who were citizens of New York, Massachusetts, Florida, California, and Pennsylvania. *Id.* at ¶ 8. The Appellants before this Court are not "citizens" of any of these states. Rather, ConAgra is a Delaware corporation with its principle place of business in Nebraska and Swift is a Delaware corporation with its principle place of business in Illinois. See Appendix at A10, ¶¶ 1 and 2. Complete diversity therefore exists.

Given the Supreme Court's determination that the citizenship of a trust's beneficiaries is "immaterial" and irrelevant" in a diversity analysis, the Notice of Removal was not defective by not identify [sic] the citizenship of Americold Realty Trust's beneficiaries.

[7] **II. Complete Diversity Exists and Any Jurisdictional Defects Have Been Cured**

The Court's second question asks: "If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the appellee aver to correct this defect in this appeal?'

* * *

Any defect in the Notice of Removal has already been cured. As noted above, the only parties in this appeal are completely diverse. There were multiple parties to the same settlement agreement with Americold Realty Trust at issue in this case, with separate judgments in the prior state court litigation. Some decided they had no claim against Americold Realty Trust and did not join in the Complaint in this action. Three of those parties, in addition to Appellants ConAgra and Swift, voluntarily joined in the original Complaint, but acquiesced in the district court judgment and did not appeal and are no longer parties in this proceeding. *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 826 (10th Cir. 1993) (a party that is not named in the notice of

appeal "is not a party to the appeal.") Thus, the judgments against them are final.[1] *See* Federal Rule of Appellate Procedure 4(a)(1)(A); *Piazza v. Aponte Roque,* 909 F.2d 35, 39 (1st Cir. 1990) ("[T]he inescapable consequence of failure to appeal a judgment within the [8] time allowed is that the judgment becomes final.").

The voluntary co-parties were dispensable and are not now parties to this appeal or to any remand. The non-appealing plaintiffs acquiesced in the judgment, and are subject to the same principles for purposes of remand as dismissed, dispensable parties. Their absence does not prejudicially affect any remaining party and solidifies the existence of diversity jurisdiction. *Ravenswood Investment Company, L.P. v. Avalon Correctional Services,* 651 F.3d 1219, 1223 (10th Cir. 2011) (a court can dismiss a dispensable non-diverse party to "cure a jurisdictional defect at any point in the litigation, including after judgment has been entered."; *Casas Office Machs. v. Mita Copystar Am.,* 42 F.3d 668, 678 (1st Cir. 1994) (dismissal of non-diverse parties "restored" complete diversity).

This Court has long held that any "defective allegations of jurisdiction" can be cured in the trial *or* appellate proceedings. *Penteco Corp. v. Union Gas*

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[1] The non-appealing parties also lack the ability to make any jurisdictional challenge. *Travelers' Indemnity Co. v. Bailey,* 557 U.S. 137, 154 (2009); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 377 (1940); *Stoll v. Gottlieb,* 305 U.S. 165, 171-172 (1938).

System, Inc., 929 F.2d 1519,1 [sic] 1523 (10th Cir. 1991). The Americold Appellees respectfully submit that the attached Declaration of Mr. Sheldon showing complete diversity of the parties to this appeal satisfies the necessary jurisdictional facts.

III. Conclusion

For the foregoing reasons, the Americold Appellees contends [sic] federal diversity jurisdiction exists in this case.

[9] Date: October 17, 2012 [sic]

/s/ Michael D. Pospisil
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John M. Edgar KS FED #70270
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Telephone: (816) 531-0033
ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Brief of Appellees was filed with the Clerk of the Court using the CM/ECF system with service to the following on this 17th day of October, 2014 to:

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f/k/a ConAgra, Inc. and Swift-Eckrich, Inc.

/s/ Michael D. Pospisil
Attorney for Appellees

EXHIBIT
A

DECLARATION OF TODD N. SHELDON

I, Todd N. Sheldon, declare that the following is true and accurate to the best of my personal knowledge and belief.

1. I am a citizen of the State of Georgia over the age of 18 and make this declaration voluntarily and based upon first-hand knowledge.

2. I am Executive Vice President, General Counsel, and Secretary at Americold Realty Trust ("Americold"), one of the Appellees in this matter.

3. The other Appellee is Americold Logistics, LLC, which is a wholly owned subsidiary of Americold.

4. Americold is a Maryland real estate investment trust formed under Title 8 of the Corporations and Associations Article of the Annotated Code of Maryland.

5. Americold is controlled by a Board of Trustees (hereafter "Trustees"). In particular, the Trustees hold, manage, control and dispose of the Trust Assets for the benefit of the Trust Owners.

6. A copy of Americold's Articles of Amendment and Restatement ("Restatement") is attached as Exhibit 1.

7 Article V of the Restatement sets forth the broad and all-encompassing powers of the Trustees. Specifically, Section 5.1 provides, in pertinent part:

> Subject to any express limitations contained in the Declaration of Trust or in the Bylaws, (a) the business and affairs of the Trust shall be managed under the direction of the Board of Trustees and (b) the Board shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary to conduct the business and affairs of the Trust. The Declaration of Trust shall be construed with the presumption in favor of the grant of power and authority to the Board.
>
> Exhibit 1 at § 5.1

8. It is my understanding that this matter was filed on September 24, 2012, and removed to

Federal Court on February 7, 2013. On that date, the Trustees consisted of seven individuals that were domiciled in the following States: New York, Massachusetts, Florida, California, and Pennsylvania.

9. The only original Plaintiffs that appealed the District Court's Order in this case are ConAgra Foods, Inc. f/k/a ConAgra, Inc. ("ConAgra") and Swift-Eckrich, Inc. ("Swift"). The other three original Plaintiffs did not appeal the dismissal of their claims and are thus not parties to this Appeal.

10. ConAgra is a Delaware corporation with its principle place of business in the State of Nebraska. Swift is a Delaware corporation with its principle place of business in the State of Illinois.

11. At the time this case was filed and at the time of removal, none of the Trustees were domiciled in or residents of Delaware, Nebraska, or Illinois. That remains true to this day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2014.

/s/ Todd N. Sheldon
Todd N. Sheldon
Executive Vice President,
General Counsel And Secretary
of Americold Realty Trust

EXHIBIT
1

AMERICOLD REALTY TRUST

ARTICLES OF AMENDMENT
AND RESTATEMENT

FIRST: Americold Realty Trust, a Maryland real estate investment trust (the "Trust"), formed under Title 8 of the Corporations and Associations Article of the Annotated Code of Maryland ("Title 8"), desires to amend and restate its Declaration of Trust as currently in effect and as hereinafter amended.

SECOND: The amendment to and restatement of the Declaration of Trust of the Trust as hereinafter set forth have been duly advised by the Board of Trustees and approved by the shareholders of the Trust as required by law.

THIRD: The following provisions are all the provisions of the Declaration of Trust currently in effect and as hereinafter amended:

ARTICLE I

FORMATION

The Trust is a real estate investment trust within the meaning of Title 8. The Trust shall not be deemed to be a general partnership, limited partnership, joint venture, joint stock company or a corporation but nothing herein shall preclude the Trust from being treated for tax purposes as an association under the

Internal Revenue Code of 1986, as amended (the "Code").

ARTICLE II

NAME

The name of the Trust is:

Americold Realty Trust

Under circumstances in which the Board of Trustees of the Trust (the "Board of Trustees" or "Board") determines that the use of the name of the Trust is not practicable, the Trust may use any other designation or name for the Trust.

ARTICLE III

PURPOSES AND POWERS

Section 3.1 Purposes. The purposes for which the Trust is formed are to invest in and to acquire, hold, manage, administer, control and dispose of property, including, without limitation or obligation, engaging in business as a real estate investment trust under the Code.

Section 3.2 Powers. The Trust shall have all of the powers granted to real estate investment trusts by Title 8 and all other powers set forth in the Declaration of Trust which are not inconsistent with law and are appropriate to promote and attain the purposes set forth in the Declaration of Trust.

ARTICLE IV

RESIDENT AGENT

The name of the resident agent of the Trust in the State of Maryland is The Corporation Trust Incorporated, whose address is 351 West Camden Street, Baltimore, Maryland 21201, The resident agent is a Maryland corporation. The Trust may have such offices or places of business within or outside the State of Maryland as the Board of Trustees may from time to time determine.

ARTICLE V

BOARD OF TRUSTEES

Section 5.1 Powers. Subject to any express limitations contained in the Declaration of Trust or in the Bylaws, (a) the business and affairs of the Trust shall be managed under the direction of the Board of Trustees and (b) the Board shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary or appropriate to conduct the business and affairs of the Trust. The Declaration of Trust shall be construed with the presumption in favor of the grant of power and authority to the Board. Any construction of the Declaration of Trust or determination made in good faith by the Board concerning its powers and authority hereunder shall be conclusive. The enumeration and definition of particular powers of the Trustees included in the Declaration of Trust or in the

Bylaws shall in no way be construed or deemed by inference or otherwise in any manner to exclude or limit the powers conferred upon the Board or the Trustees under the general laws of the State of Maryland or any other applicable laws.

The Board, without any action by the shareholders of the Trust, shall have and may exercise, on behalf of the Trust, without limitation, the power to terminate the status of the Trust as a real estate investment trust under the Code; to determine that compliance with any restriction or limitations on ownership and transfers of shares of the Trust's beneficial interest set forth in Article VII of the Declaration of Trust is no longer required in order for the Trust to qualify as a real estate investment trust under the Code; to adopt, amend and repeal Bylaws; to elect officers in the manner prescribed in the Bylaws; to solicit proxies from holders of shares of beneficial interest of the Trust; and to do any other acts and deliver any other documents necessary or appropriate to the foregoing powers.

Without limiting Section 10.2 hereof, a Trustee shall perform his or her duties as a Trustee, including his or her duties as a member of a committee of the Board of Trustees, in the same manner as required of a director of a Maryland corporation under Section 2405.1(a) of the Maryland General Corporation Law (the "MGCL"), but with the same rights, limitations and presumptions contained in Section 2-405.1(b)-(g) of the MGCL.

Section 5.2 Number. The number of Trustees (hereinafter the "Trustees") currently is four, which number may be increased or decreased pursuant to the Bylaws of the Trust. The Trustees shall be elected at each annual meeting of shareholders in the manner provided in the Bylaws or, in order to fill any vacancy on the Board of Trustees, in the manner provided in the Bylaws. The names of the Trustees who are currently in office are:

Frederic F. Brace
Jozef Opdeweegh
Stephen R. Sleigh
Ira Tochner

It shall not be necessary to list in the Declaration of Trust the names of any Trustees hereinafter elected.

Section 5.3 Resignation or Removal. Any Trustee may resign in the manner provided in the Bylaws. Subject to the rights of holders of one or more classes or series of Preferred Shares to elect or remove one or more Trustees, a Trustee may be removed at any time, with or without cause, at a meeting of the shareholders, by the affirmative vote of the holders of not less than two-thirds of the Shares then outstanding and entitled to vote generally in the election of Trustees.

Section 5.4 Determinations by Board. The determination as to any of the following matters, made in good faith by or pursuant to the direction of the Board of Trustees consistent with the Declaration of Trust, shall be final and conclusive and shall be

binding upon the Trust and every holder of Shares: the amount of the net income of the Trust for any period and the amount of assets at any time legally available for the payment of dividends, redemption of Shares or the payment of other distributions on Shares; the amount of paid-in surplus, net assets, other surplus, annual or other cash flow, funds from operations, net profit, net assets in excess of capital, undivided profits or excess of profits over losses on sales of assets; the amount, purpose, time of creation, increase or decrease, alteration or cancellation of any reserves or charges and the propriety thereof (whether or not any obligation or liability for which such reserves or charges shall have been created shall have been paid or discharged); any interpretation of the terms, preferences, conversion or other rights, voting powers or rights, restrictions, limitations as to dividends or distributions, qualifications or terms or conditions of redemption of any class or series of Shares; the fair value, or any sale, bid or asked price to be applied in determining the fair value, of any asset owned or held by the Trust or of any Shares; the number of Shares of any class of the Trust; any matter relating to the acquisition, holding and disposition of any assets by the Trust; or any other matter relating to the business and affairs of the Trust or required or permitted by applicable law, the Declaration of Trust or Bylaws or otherwise to be determined by the Board of Trustees.

ARTICLE VI

SHARES OF BENEFICIAL INTEREST

Section 6.1 Authorized Shares. The beneficial interest of the Trust shall be divided into shares of beneficial interest (the "Shares"). The Trust has authority to issue 250,000,000 common shares of beneficial interest, 5.01 par value per share ("Common Shares"), and 25,000,000 preferred shares of beneficial interest, $.01 par value per share ("Preferred Shares"). If shares of one class are classified or reclassified into shares of another class of shares pursuant to this Article VI, the number of authorized shares of the former class shall be automatically decreased and the number of shares of the latter class shall be automatically increased, in each case by the number of shares so classified or reclassified, so that the aggregate number of shares of beneficial interest of all classes that the Trust has authority to issue shall not be more than the total number of shares of beneficial interest set forth in the second sentence of this paragraph. Subject to the terms of any class or series of Preferred Shares, the Board of Trustees, with the approval of a majority of the entire Board and without any action by the shareholders of the Trust, may amend the Declaration of Trust from time to time to increase or decrease the aggregate number of Shares or the number of Shares of any class or series that the Trust has authority to issue.

Section 6.2 Common and Preferred Shares.

(a) Common Shares. Subject to the provisions of Article VII, each Common Share shall entitle the holder thereof to one vote on each matter upon which holders of Common Shares are entitled to vote. The Board of Trustees may reclassify any unissued Common Shares from time to time in one or more classes or series of Shares.

(b) Preferred Shares. The Board of Trustees may classify any unissued Preferred Shares and reclassify any previously classified but unissued Preferred Shares of any series from time to time, in one or more series of Shares.

Section 6.3 Series A Preferred Shares.

(a) Designation and Number. 125 Preferred Shares shall initially be designated as "12.5% Series A Cumulative Non-Voting Preferred Shares" (the "Series A Preferred Shares"). The express terms and provisions of all of the Series A Preferred Shares shall be identical in all respects and shall have equal rights and privileges, except as otherwise provided in this Section 6.3.

(b) Rank. The Series A Preferred Shares shall, with respect to dividend and redemption rights and rights upon liquidation, dissolution or winding up of the Trust, rank senior to the Common Shares of the Trust and to all other Shares issued by the Trust from time to time (together with the Common Shares, the "Junior Securities").

(c) Dividends.

(i) Each holder of the then outstanding Series A Preferred Shares shall be entitled to receive, when and as authorized by the Board and declared by the Trust, out of funds legally available for the payment of dividends, cumulative preferential cash dividends per Series A Preferred Share at the rate of 12.5% per annum of the total of $1,000.00 plus all accumulated and unpaid dividends thereon. Such dividends shall accrue on a daily basis and be cumulative from the first date on which any Series A Preferred Share is issued, such issue date to be contemporaneous with the receipt by the Trust of subscription funds for the Series A Preferred Shares (the "Original Issue Date"), and shall be payable semi-annually in arrears on or before June 30 and December 31 of each year or, if not a business day, the next succeeding business day (each, a "Dividend Payment Date"). Any dividend payable on the Series A Preferred Shares for any partial dividend period will be computed on the basis of a 360-day year consisting of twelve 30-day months. A "dividend period" shall mean, with respect to the first "dividend period," the period from and including the Original Issue Date to and including the first Dividend Payment Date, and with respect to each subsequent "dividend period," the period from but excluding a Dividend Payment Date to and including the next succeeding Dividend Payment Date or other date as of which accrued dividends are to be calculated. Dividends will be payable to holders of record as they

appear in the share transfer records of the Trust at the close of business on the applicable record date, which shall be the fifteenth day of the calendar month in which the applicable Dividend Payment Date falls or on such other date designated by the Board for the payment of dividends that is not more than 30 nor less than 10 days prior to such Dividend Payment Date (each, a "Dividend Record Date").

(ii) No dividends on the Series A Preferred Shares shall be declared by the Trust or paid or set apart for payment by the Trust at such time as the terms and provisions of any written agreement between the Trust and any party that is not an affiliate of the Trust, including any agreement relating to its indebtedness, prohibit such declaration, payment or setting apart for payment or provide that such declaration, payment or setting apart for payment would constitute a breach thereof or a default thereunder, or if such declaration or payment shall be restricted or prohibited by law. For purposes of this Section 6.3(c)(ii), "affiliate" shall mean any party that controls, is controlled by or is under common control with the Trust.

(iii) Notwithstanding the foregoing, dividends on the Series A Preferred Shares shall accrue whether or not the terms and provisions set forth in Section 6.3(c)(ii) above at any time prohibit the current payment of dividends, whether or not the Trust has earnings, whether or not there are funds legally available for the payment of such dividends and whether or not such dividends are authorized or

declared. Accrued but unpaid dividends on the Series A Preferred Shares will accumulate as of the Dividend Payment Date on which they first become payable. Furthermore, dividends will be declared and paid when due in all events to the fullest extent permitted by law and except as provided in Section 6.3(c)(ii) above.

(iv) Unless full cumulative dividends on all outstanding Series A Preferred Shares have been or contemporaneously are declared and paid or declared and a sum sufficient for the payment thereof is set apart for payment for all past dividend periods, no dividends (other than in shares of Junior Securities) shall be declared or paid or set apart for payment nor shall any other distribution be declared or made upon any shares of Junior Securities, nor shall any shares of Junior Securities be redeemed, purchased or otherwise acquired for any consideration (or any moneys be paid to or made available for a sinking fund for the redemption of any such Junior Securities) by the Trust (except by conversion into or exchange for other shares of Junior Securities and except for transfers, redemptions or purchases made pursuant to the provisions of Sections 7.2.1(b) and 7.3).

(v) When dividends are not paid in full (or a sum sufficient for such full payment is not set apart) on the Series A Preferred Shares, all dividends declared upon the Series A Preferred Shares shall be declared and paid pro rata based on the number of Series A Preferred Shares then outstanding.

(vi) Any dividend payment made on the Series A Preferred Shares shall first be credited against the earliest accrued but unpaid dividend due with respect to such shares which remains payable. Holders of the Series A Preferred Shares shall not be entitled to any dividend, whether payable in cash, property or shares, in excess of full cumulative dividends on the Series A Preferred Shares as described above.

(d) Liquidation Preference.

(i) Upon any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Trust, the holders of Series A Preferred Shares then outstanding will be entitled to be paid, or have the Trust declare and set apart for payment, out of the assets of the Trust legally available for distribution to its shareholders and after payment or provision for payment of the debts and other liabilities of the Trust, a liquidation preference per Series A Preferred Share equal to the sum of the following (collectively, the "Liquidation Preference"): (A) $1,000.00, (B) all accrued and unpaid dividends thereon through and including the date of payment, and (C) if the Liquidation Event occurs before the Redemption Premium (as defined below) right expires, the per share Redemption Premium in effect on the date of payment of the Liquidation Preference, before any distribution of assets is made to holders of any Junior Securities. In the event that the Trust elects to set apart the Liquidation Preference for payment, the Series A Preferred Shares shall remain outstanding

until the holders thereof are paid the full Liquidation Preference, which payment shall be made no later than immediately prior to the Trust making its final liquidating distribution on the Common Shares. In the event that the Redemption Premium in effect on the payment date is less than the Redemption Premium on the date that the Liquidation Preference was set apart for payment, the Trust may make a corresponding reduction to the funds set apart for payment of the Liquidation Preference.

(ii) In the event that, upon any such voluntary or involuntary liquidation, dissolution or winding up, the available assets of the Trust are insufficient to pay the full amount of the Liquidation Preference on all outstanding Series A Preferred Shares, then the holders of the Series A Preferred Shares shall share ratably in any such distribution of assets in proportion to the full Liquidation Preference to which they would otherwise be respectively entitled.

(iii) After payment of the full amount of the Liquidation Preference to which they are entitled, the holders of Series A Preferred Shares will have no right or claim to any of the remaining assets of the Trust.

(iv) Upon the Trust's provision of written notice as to the effective date of any such liquidation, dissolution or winding up of the Trust, accompanied by a check in the amount of the full Liquidation Preference to which each record holder of

Series A Preferred Shares is entitled, the Series A Preferred Shares shall no longer be deemed outstanding and all rights of the holders of such shares will terminate. Such notice shall be given by first class mail, postage pre-paid, to each record holder of the Series A Preferred Shares at the respective mailing addresses of such holders as the same shall appear on the share transfer records of the Trust.

(e) Consolidation and Merger. The consolidation or merger of the Trust with or into any other business enterprise or of any other business enterprise with or into the Trust, or the sale, lease or conveyance of all or substantially all of the assets or business of the Trust, or a statutory share exchange, shall not be deemed to constitute a liquidation, dissolution or winding up of the Trust.

(f) Redemption.

(i) Right of Optional Redemption. The Trust, at its option, may redeem the Series A Preferred Shares, in whole or in part, at any time or from time to time, for cash at a redemption price per Series A Preferred Share (the "Redemption Price") equal to $1,000.00 plus all accrued and unpaid dividends thereon to and including the date fixed for redemption (except as provided in Section 6(f)(iii) below), plus a redemption premium per share (each, a "Redemption Premium") calculated as follows based on the date fixed for redemption: (A) until December 31, 2010, $200; (B) from January 1, 2011 to December 31, 2011, $150; (C) from January 1, 2012 to December 31,

2012, $100; (D) from January 1, 2013 to December 31, 2013, $50; and (E) thereafter, no Redemption Premium. If less than all of the outstanding Series A Preferred Shares are to be redeemed, the Series A Preferred Shares to be redeemed may be selected by any equitable method determined by the Trust provided that such method does not result in the creation of fractional shares.

(ii) Limitations on Redemption. Unless full cumulative dividends on all Series A Preferred Shares shall have been, or contemporaneously are, declared and paid or declared and a sum sufficient for the payment thereof set apart for payment for all past dividend periods, no Series A Preferred Shares shall be redeemed or otherwise acquired, directly or indirectly, by the Trust unless all outstanding Series A Preferred Shares are simultaneously redeemed or acquired, and the Trust shall not purchase or otherwise acquire, directly or indirectly, any shares of any Junior Securities of the Trust (except by exchange for shares of Junior Securities); *provided, however,* that the foregoing shall not prevent the purchase by the Trust of shares transferred to a Charitable Beneficiary pursuant to Sections 7.2.1(b) and 7.3, in order to ensure that the Trust remains qualified as a real estate investment trust for federal income tax purposes or the purchase or acquisition of Series A Preferred Shares pursuant to a purchase or exchange offer made on the same terms to holders of all outstanding Series A Preferred Shares.

(iii) Rights to Dividends on Shares Called for Redemption. Immediately prior to or upon any redemption of Series A Preferred Shares, the Trust shall pay, in cash, any accumulated and unpaid dividends to and including the redemption date, unless a redemption date falls after a Dividend Record Date and prior to the corresponding Dividend Payment Date, in which case each holder of Series A Preferred Shares at the close of business on such Dividend Record Date shall be entitled to the dividend payable on such shares on the corresponding Dividend Payment Date notwithstanding the redemption of such shares before such Dividend Payment Date.

(iv) Procedures for Redemption.

(A) Upon the Trust's provision of written notice as to the effective date of the redemption, accompanied by a check in the amount of the full Redemption Price through such effective date to which each record holder of Series A Preferred Shares is entitled, the Series A Preferred Shares shall be redeemed and shall no longer be deemed outstanding shares of beneficial interest in the Trust and all rights of the holders of such shares will terminate. Such notice shall be given by first class mail, postage pre-paid, to each record holder of the Series A Preferred Shares at the respective mailing addresses of such holders as the same shall appear on the share transfer records of the Trust, No failure to give such notice or any defect therein or in the mailing thereof shall affect the validity of

the proceedings for the redemption of any Series A Preferred Shares except as to the holder to whom notice was defective or not given.

(B) In addition to any information required by law or by the applicable rules of any exchange upon which Series A Preferred Shares may be listed or admitted to trading, such notice shall state; (1) the redemption date; (2) the Redemption Price; (3) the number of: Series A Preferred Shares to be redeemed; (4) the place or places where the Series A Preferred Shares are to be surrendered (if so required in the notice) for payment of the Redemption Price (if not otherwise included with the notice); and (5) that dividends on the shares to be redeemed will cease to accrue on such redemption date. If less than all of the Series A Preferred Shares held by any holder are to be redeemed, the notice mailed to such holder shall also specify the number of Series A Preferred Shares held by such holder to be redeemed.

(C) If notice of redemption of any Series A Preferred Shares has been given in accordance with this Section 6.3(f)(iv), then, from and after the redemption date, dividends will cease to accrue on such Series A Preferred Shares, such Series A Preferred Shares shall no longer be deemed outstanding and all rights of the holders of such shares will terminate.

(6) Application of Article VII. The Series A Preferred Shares are subject to the provisions of Article VII, including, without limitation, the provisions of Sections 7.2.1(a) and (b) and Section 7.3.

(7) Status of Redeemed Shares. Any Series A Preferred Shares that shall at any time have been redeemed or otherwise acquired by the Trust shall, after such redemption or acquisition, have the status of authorized but unissued Series A Preferred Shares which may be issued by the Board from time to time at its discretion.

(g) Voting Rights. Except as provided in this Section, the holders of the Series A Preferred Shares shall not be entitled to vote on any matter submitted to the shareholders of the Trust for a vote. Notwithstanding the foregoing, the consent of the holders of a majority of the outstanding Series A Preferred Shares, voting as a separate class, shall be required for (i) authorization or issuance of any equity security of the Trust senior to or on a parity with the Series A Preferred Shares, (ii) any reclassification of the Series A Preferred Shares or (iii) any amendment to the Declaration of Trust or the terms of the Series A Preferred Shares, whether by merger, consolidation, transfer or conveyance of all or substantially all of the assets of the Trust or otherwise (an "Event"), which amendment materially and adversely affects any right, preference, privilege or voting power of the Series A Preferred Shares or which increases the number of authorized Series A Preferred Shares to a number greater than 1,000; *provided however* that with respect to the occurrence of any of the Events set forth in subsection (iii) above, so long as the Series A Preferred Shares remain

outstanding with the terms thereof' materially unchanged or the holders of Series A Preferred Shares receive equity securities of the successor or survivor of such Event with substantially identical rights as the Series A Preferred Shares, taking into account that, after the occurrence of an Event, the Trust may not be the surviving entity or the surviving entity may not be a real estate investment trust, the occurrence of such Event shall not be deemed to materially and adversely affect such rights, preferences, privileges or voting powers of the Series A Preferred Shares, and in such case the holders of Series A Preferred Shares shall not have any voting rights with respect to the occurrence of any of the Events set forth in subsection (iii) above unless the number of authorized Series A Preferred Shares is increased to a number greater than 1,000. Notwithstanding any other provision to the contrary, each Series A Preferred Share held by Yucaipa American Alliance Fund I, LP, Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P. and Yucaipa American Alliance (Parallel) Fund II, L.P., each a Delaware limited partnership (collectively, "Yucaipa"), shall be entitled to one vote for every 10 Series A Preferred Shares held by Yucaipa on each matter upon which holders of the Series A Preferred Shares are entitled to vote. Every other Series A Preferred Share (i.e., each Series A Preferred Share not held by Yucaipa) shall entitle the holder thereof to one vote on each matter upon which holders of Series A Preferred Shares are entitled to vote.

(h) Conversion. The Series A Preferred Shares are not convertible into or exchangeable for any other property or securities of the Trust.

(i) Notice of Transfer. Holders of Series A Preferred Shares will be required to give the Trust written prior notice of any proposed transfer of a Series A Preferred Share, which notice must specify the name of the proposed transferee.

Section 6.4 Classified or Reclassified Shares. Prior to issuance of classified or reclassified Shares of any class or series, the Board of Trustees by resolution shall (a) designate that class or series to distinguish it from all other classes and series of Shares; (b) specify the number of Shares to be included in the class or series; (c) set, subject to the provisions of Article VII and subject to the express terms of any class or series of Shares outstanding at the time, the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms and conditions of redemption for each class or series; and (d) cause the Trust to file articles supplementary with the State Department of Assessments and Taxation of Maryland (the "SDAT"). Any of the terms of any class or series of Shares set pursuant to clause (c) of this Section 6.4 may be made dependent upon facts ascertainable outside the Declaration of Trust (including the occurrence of any event, Including a determination or action by the Trust or any other person or body) and may vary among holders thereof, provided that the manner in which such facts or variations

shall operate upon the terms of such class or series of Shares is clearly and expressly set forth in the articles supplementary filed with the SDAT.

Section 6.5 Authorization by Board of Share Issuance. The Board of Trustees may authorize the issuance from time to time of Shares of any class or series, whether now or hereafter authorized, or securities or rights convertible into Shares of any class or series, whether now or hereafter authorized, for such consideration (whether in cash, property, past or future services, obligation for future payment or otherwise) as the Board of Trustees may deem advisable (or without consideration in the case of a Share split or Share dividend), subject to such restrictions or limitations, if any, as may be set forth in the Declaration of Trust or the Bylaws of the Trust.

Section 6.6 Dividends and Distributions. The Board of Trustees may from time to time authorize, and cause the Trust to declare to shareholders, such dividends or distributions, in cash or other assets of the Trust or in securities of the Trust or from any other source as the Board of Trustees in its discretion shall determine. The Board of Trustees shall endeavor to cause the Trust to declare and pay such dividends and distributions as shall be necessary for the Trust to qualify as a real estate investment trust under the Code; however, shareholders shall have no right to any dividend or distribution unless and until authorized by the Board and declared by the Trust, The exercise of the powers and rights of the Board of Trustees pursuant to this Section 6.6 shall be subject

to the provisions of any class or series of Shares at the time outstanding. Notwithstanding any other provision in the Declaration of Trust, no determination shall be made by the Board of Trustees nor shall any transaction be entered into by the Trust which would cause any Shares or other beneficial interest in the Trust not to constitute "transferable shares" or "transferable certificates of beneficial interest" under Section 856(a)(2) of the Code or which would cause any distribution to constitute a preferential dividend as described in Section 562(c) of the Code.

Section 6.7 General Nature of Shares. All Shares shall be personal property entitling the shareholders only to those rights provided in the Declaration of Trust. The shareholders shall have no interest in the property of the Trust and shall have no right to compel any partition, division, dividend or distribution of the Trust or of the property of the Trust. The death of a shareholder shall not terminate the Trust. The Trust is entitled to treat as shareholders only those persons in whose names Shares are registered as holders of Shares on the share ledger of the Trust.

Section 6.8 Fractional Shares. The Trust may, without the consent or approval of any shareholder, issue fractional Shares, eliminate a fraction of a Share by rounding off to a full Share, arrange for the disposition of a fraction of a Share by the person entitled to it, or pay cash for the fair value of a fraction of a Share.

Section 6.9 Declaration, Bylaws and Shareholders Agreement. The rights of all shareholders and the terms of all Shares are subject to the provisions of (a) the Declaration of Trust and the Bylaws of the Trust and (b) to the extent applicable to any now or hereafter authorized Shares, the Shareholders Agreement by and among the Trust and the Shareholders of the Trust, effective as of the Initial Date (as defined in Article VII), as the same may be amended from time to time (the "Shareholders Agreement").

Section 6.10 Divisions and Combinations of Shares. Subject to an express provision to the contrary in the terms of any class or series of beneficial interest hereafter authorized, the Board of Trustees shall have the power to divide or combine the outstanding shares of any class or series of beneficial interest, without a vote of shareholders.

ARTICLE VII

CERTAIN RESTRICTION ON TRANSFER AND OWNERSHIP OF SHARES

Section 7.1 Definitions. For the purpose of this Article VII, the following terms shall have the following meanings:

Aggregate Share Ownership Limit. The term "Aggregate Share Ownership Limit" shall mean not more than 7.8 percent in value of the aggregate outstanding Equity Shares. The value of the outstanding Equity Shares shall be determined by the

Board of Trustees in good faith, which determination shall be conclusive for all purposes hereof.

Beneficial Ownership. The term "Beneficial Ownership" shall mean ownership of Equity Shares by a Person, whether the interest in Equity Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) and 856(h)(3)(A) of the Code. The terms "Beneficial Owner," "Beneficially Owns" and "Beneficially Owned" shall have the correlative meanings.

Business Day. The term "Business Day" shall mean any day, other than a Saturday or Sunday, that is neither a legal holiday nor a day on which banking institutions in New York City are authorized or required by law, regulation or executive order to close.

Charitable Beneficiary. The term "Charitable Beneficiary" shall mean one or more beneficiaries of the Charitable Trust as determined pursuant to Section 7.3.6, provided that each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

Charitable Trust. The term "Charitable Trust" shall mean any trust provided for in Section 7.3.1.

Code. The term "Code" shall mean the Internal Revenue Code of 1986, as amended from time to time.

Constructive Ownership. The term "Constructive Ownership" shall mean ownership of Equity Shares by a Person, whether the interest in Equity Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 318(a) of the Code, as modified by Section 856(d)(5) of the Code. The terms "Constructive Owner," "Constructively Owns" and "Constructively Owned" shall have the correlative meanings.

Declaration of Trust. The term "Declaration of Trust" shall mean these Articles of Amendment and Restatement as accepted for record by the SDAT, and any amendments and supplements thereto.

Equity Shares. The term "Equity Shares" shall mean Shares of all classes or series, including, without limitation, Common Shares and Preferred Shares. The term "Equity Shares" shall not include convertible debt securities unless and until such securities are converted into Equity Shares of the Trust.

Excepted Holder. The term "Excepted Holder" shall mean (a) Ronald NW. Burkle; and (b) a shareholder of the Trust for whom an Excepted Holder Limit is created by this Article VII or by the Board of Trustees pursuant to Section 7.2.7.

Excepted Holder Limit. The term "Excepted Holder Limit" shall mean (a) as to Ronald W. Burkle,

18 percent in value of the aggregate of the outstanding Equity Shares and (b) provided that the affected Excepted Holder agrees to comply with the requirements established by the Board of Trustees pursuant to Section 7.2.7, and subject to adjustment pursuant to Section 7.2.8, the percentage limit established by the Board of Trustees pursuant to Section 7.2.7.

Individual. The term "Individual" shall mean (a) an "individual" within the meaning of Section 542(a)(2) of the Code, as modified by Section 544 of the Code, and/or (b) any beneficiary of a "qualified trust" (as defined in Section 856(h)(3)(E) of the Code) which qualified trust is eligible for look-through treatment under Section 856(h)(3)(A) of the Code for purposes of determining whether a REIT is closely held under Section 856(a)(6) of the Code, in which case the qualified trust shall not be treated as an Individual.

Initial Date. The term "Initial Date" shall mean the date of the closing of the transactions contemplated by the Preferred Shares Purchase Agreement by and among the Trust and GS Capital Partners VI Fund, L.P., GS Capital Partners VI Parallel, L.P., GSCP VI Offshore IceCap Investment, L.P., GSCP VI GmbH IceCap Investment, L.P., IceCap2 Holdings, L.P. and, if the CM Condition (as defined therein) is satisfied, Charm Progress Investment Limited.

Market Price. The term "Market Price" on any date shall mean, with respect to any class or series of outstanding Equity Shares, the Closing Price for such Equity Shares on such date. The "Closing Price" on any date shall mean the last sale price for such Equity Shares, regular way, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, regular way, for such Equity Shares, in either case as reported in the principal consolidated transaction reporting system with respect to securities listed or admitted to trading on the NYSE or, if such Equity Shares are not listed or admitted to trading on the NYSE, as reported on the principal consolidated transaction reporting system with respect to securities listed on the principal national securities exchange on which such Equity Shares are listed or admitted to trading or, if such Equity Shares are not listed or admitted to trading on any national securities exchange, the last quoted price, or, if not so quoted, the average of the high bid and low asked prices in the over-the-counter market, as reported by the principal automated quotation system then in use or, if such Equity Shares are not quoted by any such organization, the average of the closing bid and asked prices as furnished by a professional market maker making a market in such Equity Shares selected by the Board of Trustees or, in the event that no trading price is available for such Equity Shares, the fair market value of Equity Shares, as determined in good faith by the Board of Trustees.

NYSE. The term "NYSE" shall mean the New York Stock Exchange.

One Hundred Shareholder Date. The term "One Hundred Shareholder Date" shall mean the first date upon which the Equity Shares are beneficially owned by 100 or more Persons within the meaning of Code Section 856(a)(5) without regard to Code Section 856(h)(2).

Person. The term "Person" shall mean an individual, corporation, partnership, estate, trust (including a trust qualified under Sections 401(a) or 501(c)(17) of the Code), a portion of a trust permanently set aside for or to be used exclusively for the purposes described in Section 642(c) of the Code, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company or other entity and also includes a group as that term is used for purposes of Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, and a group to which an Excepted Holder Limit applies.

Prohibited Owner. The term "Prohibited Owner" shall mean, with respect to any purported Transfer, any Person who, but for the provisions of Section 7.2.1, would Beneficially Own or Constructively Own Equity Shares, and if appropriate in the context, shall also mean any Person who would have been the record owner of Equity Shares that the Prohibited Owner would have so owned.

REIT. The term "REIT" shall mean a real estate investment trust within the meaning of Section 856 of the Code.

Restriction Termination Date. The term "Restriction Termination Date" shall mean the first day after the Initial Date on which the Board of Trustees determines that it is no longer in the best interests of the Trust to attempt to, or continue to, qualify as a REIT or that compliance with the restrictions and limitations on Beneficial Ownership, Constructive Ownership and Transfers of Equity Shares set forth herein is no longer required in order for the Trust to qualify as a REIT.

SDAT. The term "SDAT" shall mean the State Department of Assessments and Taxation of Maryland.

Transfer. The term "Transfer" shall mean any issuance, sale, transfer, gift, assignment, devise or other disposition, as well as any other event that causes any Person to acquire Beneficial Ownership or Constructive Ownership, or any agreement to take any such actions or cause any such events, of Equity Shares or the right to vote or receive dividends on Equity Shares, including (a) the granting or exercise of any option (or any disposition of any option), (b) any disposition of any securities or rights convertible into or exchangeable for Equity Shares or any interest in Equity Shares or any exercise of any such conversion or exchange right and (c) Transfers of interests in other entities that result in changes in

Beneficial or Constructive Ownership of Equity Shares; in each case, whether voluntary or involuntary, whether owned of record, Constructively Owned or Beneficially Owned and whether by operation of law or otherwise. The terms "Transferring" and "Transferred" shall have the correlative meanings.

Trustee. The term "Trustee" shall mean the Person unaffiliated with the Trust and a Prohibited Owner, that is appointed by the Trust to serve as trustee of the Charitable Trust.

Section 7.2 Equity Shares.

Section 7.2.1 Ownership Limitations. During the period commencing on the Initial Date (or the One Hundred Shareholder Date with respect to only subsection (a)(iii) below) and prior to the Restriction Termination Date:

(a) Basic Restrictions.

(i)(1) No Individual, other than an Excepted Holder, shall Beneficially Own Equity Shares in excess of the Aggregate Share Ownership Limit, and (2) no Excepted Holder shall Beneficially Own Equity Shares in excess of the Excepted Holder Limit for such Excepted Holder.

(ii) No Person shall Beneficially or Constructively Own Equity Shares to the extent that such Beneficial or Constructive Ownership of Equity Shares would result in the Trust being "closely held" within the meaning of Section 856(h) of the Code (without regard to whether the ownership interest is

held during the last half of a taxable year), or otherwise failing to qualify as a REIT (including, but not limited to, Beneficial or Constructive Ownership that would result in the Trust owning (actually or Constructively) an interest in a tenant that is described in Section 856(d)(2)(B) of the Code if the income derived by the Trust from such tenant would cause the Trust to fail to satisfy any of the gross income requirements of Section 856(c) of the Code).

(iii) Notwithstanding any other provisions contained herein, any Transfer of Equity Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) that, if effective, would result in Equity Shares being beneficially owned by less than 100 Persons (determined under the principles of Section 856(a)(5) of the Code) shall be void *ab initio*, and the intended transferee shall acquire no rights in such Equity Shares.

(b) Transfer in Trust. If any Transfer of Equity Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) occurs which, if effective, would result in any Person Beneficially Owning or Constructively Owning Equity Shares in violation of Section 7.2.1(a)(i) or (ii),

(i) then that number of Equity Shares the Beneficial or Constructive Ownership of which otherwise would cause such Person to violate Section 7.2.1(a)(i) or (ii) (rounded to the nearest whole share) shall be automatically transferred to a Charitable Trust for the benefit of a Charitable Beneficiary, as described in Section 7.3, effective as of the close of business on the Business Day prior to the date of such Transfer, and such Person shall acquire no rights in such Equity Shares; or

(ii) if the transfer to the Charitable Trust described in clause (i) of this sentence would not be effective for any reason to prevent the violation of Section 7.2.1(a)(i) or (ii), then the Transfer of that number of Equity Shares that otherwise would cause any Person to violate Section 7.2.1(a)(i) or (ii) shall be void *ab initio*, and the intended transferee shall acquire no rights in such Equity Shares.

Section 7.2.2 Remedies for Breach. If the Board of Trustees or any duly authorized committee thereof shall at any time determine in good faith that a Transfer or other event has taken place that results in a violation of Section 7.2.1 or that a Person intends to acquire or has attempted to acquire Beneficial or Constructive Ownership of any Equity Shares in violation of Section 7.2.1 (whether or not such violation is intended), the Board of Trustees or a committee thereof shall take such action as it deems advisable to refuse to give effect to or to prevent such Transfer or other event, including, without limitation, causing the Trust to redeem Equity Shares, refusing

to give effect to such Transfer on the books of the Trust or instituting proceedings to enjoin such Transfer or other event; provided, however, that any Transfers or attempted Transfers or other events in violation of Section 7.2.1 shall automatically result in the transfer to the Charitable Trust described above, and, where applicable, such Transfer (or other event) shall be void *ab initio* as provided above irrespective of any action (or non-action) by the Board of Trustees or a committee thereof.

Section 7.2.3 Notice of Restricted Transfer. Any Person who acquires or attempts or intends to acquire Beneficial Ownership or Constructive Ownership of Equity Shares that will or may violate Section 7.2.1(a), or any Person who would have owned Equity Shares that resulted in a transfer to the Charitable Trust pursuant to the provisions of Section 7.2.1(b), shall immediately give written notice to the Trust of such event, or in the case of such a proposed or attempted transaction, give at least 15 days prior written notice, and shall provide to the Trust such other information as the Trust may request in order to determine the effect, if any, of such Transfer on the Trust's status as a REIT.

Section 7.2.4 Owners Recruited To Provide Information. From the Initial Date and prior to the Restriction Termination Date:

(a) every owner of more than five percent (or such lower percentage as required by the Code or the Treasury Regulations promulgated thereunder) of

the outstanding Equity Shares, within 30 days after the end of each taxable year, shall give written notice to the Trust stating the name and address of such owner, the number of Equity Shares and other Equity Shares Beneficially Owned, a description of the manner in which such shares are held, and whether or not the Beneficial Owner of such shares is a "foreign person" as such term is used in Section 897(h) of the Code. Each such owner shall provide to the Trust such additional information as the Trust may request in order to determine the effect, if any, of such Beneficial Ownership on the Trust's status as a REIT or as a "domestically-controlled qualified investment entity" (as such term is defined in Section 897(h) of the Code) and to ensure compliance with the Aggregate Share Ownership Limit.

(b) each Person who is a Beneficial or Constructive Owner of Equity Shares and each Person (including the shareholder of record) who is holding Equity Shares for a Beneficial or Constructive Owner shall promptly provide to the Trust such information as the Trust may request, in good faith, in order to determine the Trust's status as a REIT or as a "domestically-controlled qualified investment entity" (as such term is defined in Section 897(h) of the Code) and to comply with requirements of any taxing authority or governmental authority or to determine such compliance.

Section 7.2.5 Remedies Not Limited. Subject to Section 5.1 of the Declaration of Trust, nothing contained in this Section 7.2 shall limit the authority of

the Board of Trustees to take such other action as it deems necessary or advisable to protect the Trust and the interests of its shareholders in preserving the Trust's status as a REIT.

Section 7.2.6 Ambiguity. In the case of an ambiguity in the application of any of the provisions of this Section 7.2, Section 7.3 or any definition contained in Section 7.1, the Board of Trustees shall have the power to determine the application of the provisions of this Section 7.2 or Section 7.3 with respect to any situation based on the facts known to it. In the event Section 7.2 or 7.3 requires an action by the Board of Trustees and the Declaration of Trust fails to provide specific guidance with respect to such action, the Board of Trustees shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of Sections 7.1, 7.2 or 7.3.

Section 7.2.7 Exceptions.

(a) Subject to Section 7.2.1(a)(ii), the Board of Trustees, in its sole discretion, may exempt an Individual from the Aggregate Share Ownership Limit and may establish or increase an Excepted Holder Limit for such Individual if:

(i) the Board of Trustees obtains such representations and undertakings from such Individual as are reasonably necessary to ascertain that no Individual's Beneficial or Constructive Ownership of such Equity Shares will violate Section 7.2.1(a)(ii);

(ii) such Individual does not and represents that it will not own, actually or Constructively, an interest in a tenant of the Trust (or a tenant of any entity owned or controlled by the Trust) that would cause the Trust to own, actually or Constructively, more than a 9.8% interest (as set forth in Section 856(d)(2)(B) of the Code) in such tenant and the Board of Trustees obtains such representations and undertakings from such Individual as are reasonably necessary to ascertain this fact (for this purpose, a tenant from whom the Trust (or an entity owned or controlled by the Trust) derives (and is expected to continue to derive) a sufficiently small amount of revenue such that, in the opinion of the Board of Trustees, rent from such tenant would not adversely affect the Trust's ability to qualify as a REIT, shall not be treated as a tenant of the Trust); and

(iii) such Individual agrees that any violation or attempted violation of such representations or undertakings (or other action which is contrary to the restrictions contained in Sections 7.2.1 through 7.2.6) will result in such Equity Shares being automatically transferred to a Charitable Trust in accordance with Sections 7.2.1(b) and 7.3.

(b) Prior to granting any exception pursuant to Section 7.2.7(a), the Board of Trustees may require a ruling from the Internal Revenue Service, or an opinion of counsel, in either case in form and substance satisfactory to the Board of Trustees in its sole discretion, as it may deem necessary or advisable in order to determine or ensure the Trust's status as a

REIT. Notwithstanding the receipt of any ruling or opinion, the Board of Trustees may impose such conditions or restrictions as it deems appropriate in connection with granting such exception.

(c) Subject to Section 7.2.1(a)(ii), an underwriter which participates in a public offering or a private placement of Equity Shares (or securities convertible into or exchangeable for Equity Shares) may Beneficially Own or Constructively Own Equity Shares (or securities convertible into or exchangeable for Equity Shares) in excess of the Aggregate Share Ownership Limit, but only to the extent necessary to facilitate such public offering or private placement.

(d) The Board of Trustees may only reduce the Excepted Holder Limit for an Excepted Holder: (1) with the written consent of such Excepted Holder at any time, or (2) pursuant to the terms and conditions of the agreements and undertakings entered into with such Excepted Holder in connection with the establishment of the Excepted Holder Limit for that Excepted Holder. No Excepted Holder Limit shall be reduced to a percentage that is less than the Aggregate Share Ownership Limit.

Section 7.2.8 Changes in Aggregate Share Ownership Limit. Subject to Section 7.2.1(a)(ii), the Board of Trustees may from time to time establish or increase an Excepted Holder Limit for one or more Individuals (whereby such Individual will be an Excepted Holder) and decrease the Aggregate Share Ownership Limit for all other Individuals; provided,

however, that the decreased Aggregate Share Ownership Limit will not be effective for any Individual whose percentage ownership of Shares is in excess of such decreased Aggregate Share Ownership Limit until such time as such Individual's percentage of Shares equals or falls below the decreased Aggregate Share Ownership Limit, but any further acquisition of Shares in excess of such percentage ownership of Shares will be in violation of the Aggregate Share Ownership Limit and, provided further, that the new Excepted Holder Limit, Aggregate Share Ownership Limit would not allow five or fewer Individuals to Beneficially Own more than 49.9% in value of the outstanding Shares.

Section 7.2.9 Legend. Each certificate for Equity Shares (if such Equity Shares are certificated, which determination shall be at the sole discretion of the Board of Trustees) shall bear substantially the following legend and any other legend required by the Shareholders Agreement (to the extent such legend is still required):

> The shares represented by this certificate are subject to restrictions on Beneficial and Constructive Ownership and Transfer for the purpose of the Trust's maintenance of its status as a Real Estate Investment Trust (a "REIT") under the Internal Revenue Code of 1986, as amended (the "Code"). Subject to certain further restrictions and except as expressly provided in the Trust's Declaration of Trust, (i) no Individual may Beneficially Own Equity Shares of the Trust in excess of 7.8

percent of the value of the total outstanding Equity Shares of the Trust, unless such Individual Is an Excepted Holder (in which case the Excepted Holder Limit shall be applicable); (ii) no Person may Beneficially or Constructively Own Equity Shares that would result in the Trust being "closely held" under Section 856(h) of the Code or otherwise cause the Trust to fail to qualify as a REIT; and (iii) no Person may Transfer Equity Shares if such Transfer would result in Equity Shares of the Trust being owned by fewer than 100 Persons. Any Person who Beneficially or Constructively Owns or attempts to Beneficially or Constructively Own Equity Shares which cause or will cause a Person to Beneficially or Constructively Own Equity Shares in excess or in violation of the above limitations must immediately notify the Trust. If any of the restrictions on transfer or ownership are violated, the Equity Shares represented hereby will be automatically transferred to a Trustee of a Charitable Trust for the benefit of one or more Charitable Beneficiaries. In addition, upon the occurrence of certain events, attempted Transfers in violation of the restrictions described above may be void *ab initio*. All capitalized terms in this legend have the meanings defined in the Trust's Declaration of Trust, as the same may be amended from time to time, a copy of which, including the restrictions on transfer and ownership, will be furnished to each holder of Equity Shares of the Trust on request and without charge.

Instead of the foregoing legend, the certificate may state that the Trust will furnish a full statement about certain restrictions on transferability to a shareholder on request and without charge.

Section 7.3 Transfer of Equity Shares in Trust.

Section 7.3.1 Ownership in Trust. Upon any purported Transfer or other event described in Section 7.2.1(b) that would result in a transfer of Equity Shares to a Charitable Trust, such Equity Shares shall be deemed to have been transferred to the Trustee as trustee of a Charitable Trust for the exclusive benefit of one or more Charitable Beneficiaries. Such transfer to the Trustee shall be deemed to be effective as of the close of business on the Business Day prior to the purported Transfer or other event that results in the transfer to the Charitable Trust pursuant to Section 7.2.1(b). The Trustee shall be appointed by the Trust and shall be a Person unaffiliated with the Trust and any Prohibited Owner. Each Charitable Beneficiary shall be designated by the Trust as provided in Section 7.3.6.

Section 7.3.2 Status of Shares Held by the Trustee. Equity Shares held by the Trustee shall be issued and outstanding Equity Shares of the Trust. The Prohibited Owner shall have no rights in the shares held by the Trustee. The Prohibited Owner shall not benefit economically from ownership of any shares held in trust by the Trustee, shall have no rights to dividends or other distributions and shall not possess any rights

to vote or other rights attributable to the shares held in the Charitable Trust.

Section 7.3.3 Dividend and Voting Rights. The Trustee shall have all voting rights and rights to dividends or other distributions with respect to Equity Shares held in the Charitable Trust, which rights shall be exercised for the exclusive benefit of the Charitable Beneficiary. Any dividend or other distribution paid prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee shall be paid with respect to such Equity Shares to the Trustee upon demand and any dividend or other distribution authorized but unpaid shall be paid when due to the Trustee. Any dividends or distributions so paid over to the Trustee shall be held in trust for the Charitable Beneficiary. The Prohibited Owner shall have no voting rights with respect to shares held in the Charitable Trust and, subject to Maryland law, effective as of the date that Equity Shares have been transferred to the Trustee, the Trustee shall have the authority (at the Trustee's sole discretion) (i) to rescind as void any vote cast by a Prohibited Owner prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee and (ii) to recast such vote In accordance with the desires of the Trustee acting for the benefit of the Charitable Beneficiary; provided, however, that if the Trust has already taken irreversible trust action, then the Trustee shall not have the authority to rescind and recast such vote. Notwithstanding the provisions of this Article VII, until the Trust has

received notification that Equity Shares have been transferred into a Charitable Trust, the Trust shall be entitled to rely on its share transfer and other shareholder records for purposes of preparing lists of shareholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting votes of shareholders.

Section 7.3.4 Sale of Shares by Trustee. Within 20 days of receiving notice from the Trust that Equity Shares have been transferred to the Charitable Trust, the Trustee of the Charitable Trust shall sell the shares held in the Charitable Trust to a person, designated by the Trustee, whose ownership of the shares will not violate the ownership limitations set forth in Section 7.2.1(a). Upon such sale, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner and to the Charitable Beneficiary as provided in this Section 7.3.4. The Prohibited Owner shall receive the lesser of (1) the price paid by the Prohibited Owner for the shares or, if the Prohibited Owner did not give value for the shares in connection with the event causing the shares to be held in the Charitable Trust (e.g., in the case of a gift, devise or other such transaction), the Market Price of the shares on the day of the event causing the shares to be held in the Charitable Trust and (2) the price per share received by the Trustee from the sale or other disposition of the shares held in the Charitable Trust. Any net sales proceeds in excess of the amount payable to the Prohibited Owner shall

be immediately paid to the Charitable Beneficiary. If, prior to the discovery by the Trust that Equity Shares have been transferred to the Trustee, such shares are sold by a Prohibited Owner, then (i) such shares shall be deemed to have been sold on behalf of the Charitable Trust and (ii) to the extent that the Prohibited Owner received an amount for such shares that exceeds the amount that such Prohibited Owner was entitled to receive pursuant to this Section 7.3.4, such excess shall be paid to the Trustee upon demand.

Section 7.3.5 Purchase Right in Shares Transferred to the Trustee. Equity Shares transferred to the Trustee shall be deemed to have been offered for sale to the Trust, or its designee, at a price per share equal to the lesser of (i) the price per share in the transaction that resulted in such transfer to the Charitable Trust (or, in the case of a devise or gift, the Market Price at the time of such devise or gift) and (ii) the Market Price on the date the Trust, or its designee, accepts such offer. The Trust shall have the right to accept such offer until the Trustee has sold the shares held in the Charitable Trust pursuant to Section 7.3.4. Upon such a sale to the Trust, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner.

Section 7.3.6 Designation of Charitable Beneficiaries. By written notice to the Trustee, the Trust shall designate one or more nonprofit organizations to be the Charitable Beneficiary of the interest in the Charitable Trust such that (i) Equity Shares held in

the Charitable Trust would not violate the restrictions set forth in Section 7.2.1(a) in the hands of such Charitable Beneficiary and (ii) each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

Section 7.4 NYSE Transactions. Nothing in this Article VII shall preclude the settlement of any transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system. The fact that the settlement of any transaction occurs shall not negate the effect of any other provision of this Article VII and any transferee in such a transaction shall be subject to all of the provisions and limitations set forth in this Article VII.

Section 7.5 Enforcement. The Trust is authorized specifically to seek equitable relief, including injunctive relief, to enforce the provisions of this Article VII.

Section 7.6 Non-Waiver. No delay or failure on the part of the Trust or the Board of Trustees in exercising any right hereunder shall operate as a waiver of any right of the Trust or the Board of Trustees, as the case may be, except to the extent specifically waived in writing.

ARTICLE VIII

SHAREHOLDER AGREEMENT RESTRICTIONS ON TRANSFER AND OWNERSHIP OF SHARES

Section 8.1 Definitions. For the purposes of this Article VIII, the term "Transfer" shall have the meaning set forth in the Shareholders Agreement. Terms used but not defined in this Article VIII shall have the meanings assigned to them in the Shareholders Agreement.

Section 8.2 Restrictions. No Shareholder shall be entitled to Transfer any Shares at any time if such Transfer would (a) violate the Securities Act, or any state (or other jurisdiction) securities or "Blue Sky" laws applicable to the Company or the applicable Transfer of Shares; (b) cause the Company to become subject to the registration requirements of the U.S. Investment Company Act of 1940, as amended from time to time; (c) cause the Company to fail to be a "domestically-controlled qualified investment entity" within the meaning of Section 897(h) of the Code; or (d) otherwise violate the restrictions on Transfer contained in the Shareholders Agreement (to the extent any such restriction is still in effect).

Section 8.3 Transfers Void. Any Transfer in violation of Section 8.2 and the related provisions of the Shareholders Agreement (to the extent any such restriction is still in effect) shall be null and void *ab initio*.

Section 8.4 Compliance with Right of First Refusal and Tag Along Rights. To the extent applicable to a Shareholder pursuant to the Shareholders Agreement, no transfer of Shares shall occur without compliance with the rights of first refusal set forth in Section 3.2 of the Shareholders Agreement and compliance with the tag along rights in Section 3.3 of the Shareholders Agreement.

ARTICLE IX

SHAREHOLDERS

Section 9.1 Meetings. There shall be an annual meeting of the shareholders, to be held on proper notice at such time (after the delivery of the annual report) and convenient location as shall be determined by or in the manner prescribed in the Bylaws, for the election of the Trustees, if required, and for the transaction of any other business within the powers of the Trust. Except as otherwise provided in the Declaration of Trust, special meetings of shareholders may be called in the manner provided in the Bylaws. If there are no Trustees, the officers of the Trust shall promptly call a special meeting of the shareholders entitled to vote for the election of successor Trustees. Any meeting may be adjourned and reconvened as the Trustees determine or as provided in the Bylaws.

Section 9.2 Voting Rights. Subject to the provisions of any class or series of Shares then outstanding, the shareholders shall be entitled to vote only on

the following matters: (a) election of Trustees as provided in Section 5.2 and the removal of Trustees as provided in Section 5.3; (b) amendment of the Declaration of Trust as provided in Article XI; (c) termination of the Trust as provided in Section 14.2; (d) merger or consolidation of the Trust, or the sale or disposition of substantially all of the Trust Property, as provided in Article XII; and (e) such other matters with respect to which the Board of Trustees has adopted a resolution declaring that a proposed action is advisable and directing that the matter be submitted to the shareholders for approval or ratification. Except with respect to the foregoing matters, no action taken by the shareholders at any meeting shall in any way bind the Board of Trustees.

Section 9.3 Preemptive and Appraisal Rights. Except as may be provided by the Board of Trustees in setting the terms of classified or reclassified Shares pursuant to Section 6.4, or as may otherwise be provided by contract approved by the Board of Trustees, no holder of Shares shall, as such holder, have any preemptive right to purchase or subscribe for any additional Shares of the Trust or any other security of the Trust which it may issue or sell. Holders of Shares shall not be entitled to exercise any rights of an objecting shareholder provided for under Title 8 and Title 3, Subtitle 2 of the MGCL or any successor statute unless the Board of Trustees, upon the affirmative vote of a majority of the Board of Trustees, shall determine that such rights apply, with respect to all or any classes or series of Shares, to one

or more transactions occurring after the date of such determination in connection with which holders of such Shares would otherwise be entitled to exercise such rights.

Section 9.4 Extraordinary Actions. Except as specifically provided in Section 5.3 (relating to removal of Trustees), Section 12.3 with respect to Section 5.3 and Article X, and the Shareholders Agreement, notwithstanding any provision of law permitting or requiring any action to be taken or authorized by the affirmative vote of the holders of a greater number of votes, any such action shall be effective and valid if advised by the Board of Trustees and taken or approved by the affirmative vote of holders of Shares entitled to cast a majority of all the votes entitled to be cast on the matter.

Section 9.5 Board Approval. The submission of any action to the shareholders for their consideration shall first be approved by the Board of Trustees.

Section 9.6 Action By Shareholders without a Meeting. The Bylaws of the Trust may provide that any action required or permitted to be taken by the shareholders may be taken without a meeting by the written consent of the shareholders entitled to cast a sufficient number of votes to approve the matter as required by statute, the Declaration of Trust or the Bylaws of the Trust, as the case may be.

ARTICLE X

LIABILITY LIMITATION, INDEMNIFICATION AND TRANSACTIONS WITH THE TRUST

Section 10.1 Limitation of Shareholder Liability. No shareholder shall be liable for any debt, claim, demand, judgment or obligation of any kind of, against or with respect to the Trust by reason of his being a shareholder, nor shall any shareholder be subject to any personal liability whatsoever, in tort, contract or otherwise, to any person in connection with the property or the affairs of the Trust by reason of his being a shareholder.

Section 10.2 Limitation of Trustee and Officer Liability. To the maximum extent that Maryland law in effect from time to time permits limitation of the liability of trustees and officers of a real estate investment trust, no Trustee or officer of the Trust shall be liable to the Trust or to any shareholder for money damages. Neither the amendment nor repeal of this Section 10.2, nor the adoption or amendment of any other provision of the Declaration of Trust inconsistent with this Section 10.2, shall apply to or affect in any respect the applicability of the preceding sentence with respect to any act or failure to act which occurred prior to such amendment, repeal or adoption.

Section 10.3 Indemnification. The Trust shall have the power, to the maximum extent permitted by Maryland law in effect from time to time, to obligate itself to indemnify, and to pay or reimburse reasonable

expenses in advance of final disposition of a proceeding to, (a) any individual who is a present or former shareholder, Trustee or officer of the Trust or (b) any individual who, while a Trustee or officer of the Trust and at the request of the Trust, serves or has served as a director, officer, partner, trustee, member, manager, employee or agent of another real estate investment trust, corporation, limited liability company, partnership, joint venture, trust, employee benefit plan or any other enterprise from and against any claim or liability to which such person may become subject or which such person may incur by reason of his status as a present or former shareholder, Trustee or officer of the Trust. The Trust shall have the power, with the approval of its Board of Trustees, to provide such indemnification and advancement of expenses to a person who served a predecessor of the Trust in any of the capacities described in (a) or (b) above and to any employee or agent of the Trust or a predecessor of the Trust.

Section 10.4 Transactions Between the Trust and its Trustees, Officers, Employees and Agents. Subject to any express restrictions in the Declaration of Trust or the Shareholders Agreement or adopted by the Trustees in the Bylaws or by resolution, the Trust may enter into any contract or transaction of any kind with any person, including any Trustee, officer, employee or agent of the Trust or any person affiliated with a Trustee, officer, employee or agent of the Trust, whether or not any of them has a financial interest in such transaction.

ARTICLE XI

CORPORATE OPPORTUNITIES

Section 11.1 Applicability of Provisions. With respect to this Article XI: (a) until the IPO (as defined in the Shareholders Agreement) of the Trust, the provisions of Section 11.2 shall be effective, but Sections 11.3 through 11.8 shall not be effective; and (b) from and after the IPO, Sections 11.3 through 11.8 shall be effective, but Section 11.2 shall not be effective.

Section 11.2 Waiver of Corporate Opportunity (Pre-IPO). To the fullest extent permitted by applicable law and as contemplated by the Shareholders Agreement, the Trust, on behalf of itself and its subsidiaries, renounces any interest, duty or expectancy of the Trust and its subsidiaries in, or in being offered an opportunity to participate in, business opportunities that are from time to time presented to any Shareholder Party (as defined in the Shareholder Agreement) even if the opportunity is one that the Trust or its subsidiaries might reasonably be deemed to have pursued or had the ability or desire to pursue if granted the opportunity to do so and each Shareholder Party shall have no duty to communicate or offer such business opportunity to the Trust or any of its subsidiaries and, to the fullest extent permitted by applicable law, shall not be liable to the Trust or any of its subsidiaries for breach of any duty, as a Trustee of the Trust or otherwise, by reason of the fact that such Shareholder Party pursues or acquires such

business opportunity, directs such business opportunity to another Person or fails to present such business opportunity, or information regarding such business opportunity, to the Trust or its subsidiaries.

Section 11.3 Definitions (Post-IPO). For the purpose of this Article XI, the following terms shall have the following meanings:

Affiliate. The term "Affiliate" shall mean, with respect to any specified person or entity, any other person or entity who or which, directly or indirectly, controls, is controlled by, or is under common control with such person or entity, including, without limitation, any general partner, managing member or partner, officer, director or trustee of such person or entity or any private equity fund now or hereafter existing that is controlled by one or more general partners or managing members of, or shares the same management company with, such person or entity. For purposes of this definition, the terms "controlling," "controlled by," or "under common control with" shall mean the possession, directly or indirectly, of (i) the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract, or otherwise, or (ii) the power to elect or appoint at least 50% of the directors, managers, general partners, or persons exercising similar authority with respect to such person or entity.

Retained Opportunity. The term "Retained Opportunity" shall mean any corporate opportunity (a) which the Trust is financially able to undertake, (b) which the Trust is not prohibited by contract or applicable law from pursuing or undertaking, (c) which, from its nature, is in the line of the Trust's business, (d) which is of practical advantage to the Trust, and (e) in which the Trust has an interest or a reasonable expectancy.

GSCP Entity. The terms "GSCP Entities" and "GSCP Entity" shall mean the GSCP Funds, their respective Affiliates and any portfolio company in which any of the foregoing has any equity investment (other than the Trust and its subsidiaries).

GSCP Funds. The term "GSCP Funds" shall mean GS Capital Partners VI Fund, L.P., GS Capital Partners VI Parallel, L.P., GSCP VI Offshore IceCap Investment, L.P., GSCP VI GmbH IceCap Investment, L.P. and IceCap2 Holdings, L.P.

GSCP Nominee. The term "GSCP Nominee" shall mean any officer, trustee, director, partner, member, manager, employee, or other agent of a GSCP Entity.

Yucaipa Entity. The terms "Yucaipa Entities" and "Yucaipa Entity" shall mean the Yucaipa Funds, their respective Affiliates and any portfolio company in which any of the foregoing has any equity investment (other than the Trust and its subsidiaries).

Yucaipa Funds. The term "Yucaipa Funds" shall mean Yucaipa American Alliance Fund I, LP, Yucaipa

American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P., Yucaipa American Alliance (Parallel) Fund II, L.P. and Yucaipa Corporate Initiatives Fund I, LP and any other entity managed, controlled or owned, directly or indirectly, by any such fund (or by any Affiliate of any such fund) that may acquire any direct or indirect interest in the Trust.

Yucaipa Nominee. The term "Yucaipa Nominee" shall mean any officer, trustee, director, partner, member, manager, employee, or other agent of a Yucaipa Entity.

Section 11.4 General (Post-IPO). In recognition that (i) the GSCP Funds and the Yucaipa Funds are and will be significant shareholders of the Trust; (ii) the GSCP Entities and the Yucaipa Entities have participated, directly or indirectly, and will continue to participate in investments in entities and enterprises some of which may engage in or relate to businesses that are the same as or similar to that of the Trust and/or its subsidiaries or that may compete with, or involve persons or entities that compete with, the Trust and/or its subsidiaries; (iii) owners, partners, directors and employees of the GSCP Entities or the Yucaipa Entities may be directors, managers, employees or advisors of entities (including, among others, the Trust and/or its subsidiaries) in which a GSCP Entity or a Yucaipa Entity, as applicable, has invested or may invest and, in such positions, may encounter business opportunities that the Trust or its subsidiaries or shareholders may desire to pursue;

and (iv) the Trust and its subsidiaries will derive benefits from the potential participation of GSP Nominees and Yucaipa Nominees in the Trust or its subsidiaries, whether as trustees, directors, employees or otherwise, and through their continued contractual, corporate and business relations with the GSCP Entities or the Yucaipa Entities, as applicable, the provisions of this Article XI are set forth to regulate, define and guide, to the fullest extent permitted by applicable law, the conduct of certain affairs of the Trust and its subsidiaries as they may involve GSCP Entities, GSCP Nominees, Yucaipa Entitles and Yucaipa Nominees and the powers, rights, duties and liabilities of the Trust, the GSCP Funds and the Yucaipa Funds and their respective officers, directors, trustees, employees, members, managers, shareholders, partners and agents in connection therewith.

Section 11.5 Provisions Related Business Activities (Post-IPO). The GSCP Entities and the Yucaipa Entities shall have the right to (and none of the GSCP Entities, the Yucaipa Entities nor any GSCP Nominee or Yucaipa Nominee shall have any obligation or duty to abstain or cause any GSCP Entity or Yucaipa Entity, as applicable, to abstain from exercising such right to): (i) engage or invest, directly or indirectly, in the same, similar or related business activities or lines of business as the Trust and/or its subsidiaries, (ii) do business with any customer, supplier or lessor of the Trust or its subsidiaries and (iii) employ or otherwise engage any officer, trustee or employee of the Trust or its subsidiaries.

Section 11.6 Corporate Opportunities (Post-IPO). if (i) any GSCP Entity or any GSCP Nominee acquires knowledge of a potential transaction or matter that may be a corporate opportunity for any GSCP Entity, or (ii) any Yucaipa Entity or any Yucaipa Nominee acquires knowledge of a potential transaction or matter that may be a corporate opportunity for any Yucaipa Entity, none of the Trust or its subsidiaries or shareholders shall have any interest in such corporate opportunity or any expectation that such corporate opportunity be offered to it or that it be offered an opportunity to participate therein, and any such interest, expectation, offer or opportunity to participate, and any other interest or expectation otherwise due to the Trust or its subsidiaries or shareholders with respect to such corporate opportunity, is hereby renounced by the Trust on its behalf and on behalf of its subsidiaries and its shareholders. Accordingly, (i) no GSCP Entity or GSCP Nominee, Yucaipa Entity or Yucaipa Nominee, will be under any obligation or duty to present, communicate or offer any such corporate opportunity to the Trust or any of its subsidiaries and (ii) the GSCP Entities and the Yucaipa Entities shall have the right to hold and exploit any such corporate opportunity for their own account, or to direct, recommend, sell, assign or otherwise transfer such corporate opportunity to any person or entity other than the Trust and its subsidiaries and shall be under no obligation or duty to act otherwise.

Section 11.7 Trustees, Officers and Employees (Post-IPO). Notwithstanding the provisions of Section 11.6 above, the Trust does not renounce any interest or expectancy it may have under applicable law in any Retained Opportunity that is expressly offered to a GSCP Nominee or a Yucaipa Nominee solely in, and as a direct result of, his or her capacity as a trustee, officer or employee of the Trust. If the Chief Executive Officer, the Chief Operating Officer or the Chief Financial Officer of the Trust (or, during the vacancy of any of those titles, the executive officer performing the functions of such vacant role) shall be a (i) GSCP Nominee by virtue of his or her respective relationship with a GSCP Entity, or (ii) Yucaipa Nominee by virtue of his or her respective relationship with a Yucaipa Entity, then any corporate opportunity offered to such officer shall be deemed to have been offered solely in, and as a direct result of, such officer's rapacity as an officer of the Trust unless such offer clearly and expressly is presented to such officer solely in, and as a direct result of, his or her capacity as an officer, trustee, director, partner, member, manager, employee or other agent of a GSCP Entity or a Yucaipa Entity, as applicable.

Section 11.8 Application of Provision (Post-IPO). This Article XI shall apply as set forth above except to the extent otherwise prohibited by applicable law. No alteration, amendment, termination, expiration or repeal of this Article XI, nor the adoption of any provision of the Declaration of Trust inconsistent with this Article XI shall eliminate, reduce, apply to, or

have any effect on (i) the protections afforded hereby to any GSCP Entity, GSCP Nominee, Yucaipa Entity or Yucaipa Nominee for or with respect to any investments, activities or opportunities of which such GSCP Entity, GSCP Nominee, Yucaipa Entity or Yucaipa Nominee, as applicable, becomes aware prior to such alteration, amendment, termination, expiration, repeal or adoption or (ii) any matter occurring, or any cause of action, suit or claim that, but for this Article XI, would accrue or arise, prior to such alteration, amendment, repeal or adoption.

ARTICLE XII

AMENDMENTS

Section 12.1 General. The Trust reserves the right from time to time to make any amendment to the Declaration of Trust, now or hereafter authorized by law, including any amendment altering the terms or contract rights, as expressly set forth in the Declaration of Trust, of any Shares. All rights and powers conferred by the Declaration of Trust on shareholders, Trustees and officers are granted subject to this reservation. An amendment to the Declaration of Trust (a) shall be signed and acknowledged by at least a majority of the Trustees, or an officer duly authorized by at least a majority of the Trustees, (b) shall be filed for record as provided in Section 15.5 and (c) shall become effective as of the later of the time the SDAT accepts the amendment for record or the time established in the amendment, not to exceed

30 days after the amendment is accepted for record. All references to the Declaration of Trust shall include all amendments and supplements thereto. For the avoidance of doubt, this Article XII shall be subject to the terms and conditions of the Shareholders Agreement.

Section 12.2 By Trustees. The Trustees may amend the Declaration of Trust from time to time, in the manner provided by Title 8, without any action by the shareholders, (i) to qualify as a real estate investment trust under the Code or under Title 8, (ii) in any respect in which the charter of a corporation may be amended in accordance with Section 2-605 of the MGCL and (iii) as otherwise provided in the Declaration of Trust.

Section 12.3 By Shareholders. Except as otherwise provided in the Declaration of Trust, any amendment to the Declaration of Trust shall be valid only if approved by the affirmative vote of a majority of all the votes entitled to be cast on the matter. Any amendment to Section 5.3, Article X or to this sentence of the Declaration of Trust shall be valid only if approved by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter.

ARTICLE XIII

MERGER, CONSOLIDATION OR SALE OF TRUST PROPERTY

Subject to the provisions of any class or series of Shares at the time outstanding, the Trust may (a) merge the Trust into another entity, (b) consolidate the Trust with one or more other entities into a new entity or (c) sell, lease, exchange or otherwise transfer all or substantially all of the Trust Property. Any such action must be approved by the Board of Trustees and, after notice to all shareholders entitled to vote on the matter, by the affirmative vote of a majority of all the votes entitled to be cast on the matter. For the avoidance of doubt, this Article XIII shall be subject to the terms and conditions of the Shareholders Agreement.

ARTICLE XIV

DURATION AND TERMINATION OF TRUST

Section 14.1 Duration. The Trust shall continue perpetually unless terminated pursuant to Section 14.2 or pursuant to any applicable provision of Title 8.

Section 14.2 Termination.

(a) Subject to the provisions of any class or series of Shares at the time outstanding, after approval by a majority of the entire Board of Trustees, the Trust may be terminated at any meeting of shareholders, by the affirmative vote of a majority of

all the votes entitled to be cast on the matter. Upon the termination of the Trust:

(i) The Trust shall carry on no business except for the purpose of winding up its affairs.

(ii) The Trustees shall proceed to wind up the affairs of the Trust and all of the powers of the Trustees under the Declaration of Trust shall continue, including the powers to fulfill or discharge the Trust's contracts, collect its assets, sell, convey, assign, exchange, transfer or otherwise dispose of all or any part of the remaining property of the Trust to one or more persons at public or private sale for consideration which may consist in whole or in part of cash, securities or other property of any kind, discharge or pay its liabilities and do all other acts appropriate to liquidate its business. The Trustees may appoint any officer of the Trust or any other person to supervise the winding up of the affairs of the Trust and delegate to such officer or such person any or all powers of the Trustees in this regard.

(iii) After paying or adequately providing for the payment of all liabilities, and upon receipt of such releases, indemnities and agreements as they deem necessary for their protection, the Trust may distribute the remaining property of the Trust among the shareholders so that after payment in full or the setting apart for payment of such preferential amounts, if any, to which the holders of any Shares at the time outstanding shall be entitled, the remaining property of the Trust shall, subject to any participating

or similar rights of Shares at the time outstanding, be distributed ratably among the holders of Common Shares at the time outstanding.

(b) After termination of the Trust, the liquidation of its business and the distribution to the shareholders as herein provided, a majority of the Trustees shall execute and file with the Trust's records a document certifying that the Trust has been duly terminated, and the Trustees shall be discharged from all liabilities and duties hereunder, and the rights and interests of all shareholders shall cease.

ARTICLE XV

MISCELLANEOUS

Section 15.1 Governing Law. The Declaration of Trust is executed and delivered in the State of Maryland with reference to the laws thereof, and the rights of all parties and the validity, construction and effect of every provision hereof shall be subject to and construed according to the laws of the State of Maryland without regard to conflicts of laws provisions thereof.

Section 15.2 Reliance by Third Parties. Any certificate shall be final and conclusive as to any person dealing with the Trust if executed by the Secretary or an Assistant Secretary of the Trust or a Trustee, and if certifying to: (a) the number or identity of Trustees, officers of the Trust or shareholders; (b) the due authorization of the execution of any

document; (c) the action or vote taken, and the existence of a quorum, at a meeting of the Board of Trustees or shareholders; (d) a copy of the Declaration of Trust or of the Bylaws as a true and complete copy as then in force; (e) an amendment to the Declaration of Trust; (f) the termination of the Trust; or (g) the existence of any fact relating to the affairs of the Trust. No purchaser, lender, transfer agent or other person shall be bound to make any inquiry concerning the validity of any transaction purporting to be made by the Trust on its behalf or by any officer, employee or agent of the Trust.

Section 15.3 Severability.

(a) The provisions of the Declaration of Trust are severable, and if the Board of Trustees shall determine, with the advice of counsel, that any one or more of such provisions (the "Conflicting Provisions") are in conflict with the Code, Title 8 or other applicable federal or state laws, the Conflicting Provisions, to the extent of the conflict, shall be deemed never to have constituted a part of the Declaration of Trust, even without any amendment of the Declaration of Trust pursuant to Article XI and without affecting or impairing any of the remaining provisions of the Declaration of Trust or rendering invalid or improper any action taken or omitted prior to such determination. No Trustee shall be liable for making or failing to make such a determination. In the event of any such determination by the Board of Trustees, the Board shall amend the Declaration of Trust in the manner provided in Section 12.2.

(b) If any provision of the Declaration of Trust shall be held invalid or unenforceable in any jurisdiction, such holding shall apply only to the extent of any such invalidity or unenforceability and shall not in any manner affect, impair or render invalid or unenforceable such provision in any other jurisdiction or any other provision of the Declaration of Trust in any jurisdiction.

Section 15.4 Construction. In the Declaration of Trust, unless the context otherwise requires, words used in the singular or in the plural include both the plural and singular and words denoting any gender include all genders. The title and headings of different parts are inserted for convenience and shall not affect the meaning, construction or effect of the Declaration of Trust. In defining or interpreting the powers and duties of the Trust and its Trustees and officers, reference may be made by the Trustees or officers, to the extent appropriate and not inconsistent with the Code or Title 8, to Titles 1 through 3 of the Corporations and Associations Article of the Annotated Code of Maryland.

Section 15.5 Recordation. The Declaration of Trust and any amendment or supplement hereto shall be filed for record with the SDAT and may also be filed or recorded in such other places as the Trustees deem appropriate, but failure to file for record the Declaration of Trust or any amendment or supplement hereto in any office other than in the State of Maryland shall not affect or impair the validity or effectiveness of the Declaration of Trust or any

amendment or supplement hereto. A restated Declaration of Trust shall, upon filing, be conclusive evidence of all amendments and supplements contained therein and may thereafter be referred to in lieu of the original Declaration of Trust and the various amendments and supplements thereto.

FOURTH: The total number of shares of beneficial interest which the Trust is authorized to issue has not changed by these Articles of Amendment and Restatement.

The undersigned acknowledges these Articles of Amendment and Restatement to be the trust act of the Trust and as to all matters or facts required to be verified under oath, the undersigned acknowledges that to the best of his knowledge, information and belief, these matters and facts are true in all material respects and that this statement is made under the penalties for perjury.

[Signature page follows.]

CUST ID:0002518541
WORK ORDER:0003735121
DATE:12-14-2010 11:47 AM
AMT. PAID:$1,027.00

IN WITNESS WHEREOF, the Trust has caused these Articles of Amendment and Restatement to be signed in its name and on its behalf by its Executive Vice President and Chief Financial Officer and attested to by its Secretary on this 13th day of December, 2010.

ATTEST:	AMERICOLD REALTY TRUST
/s/ Michael J. Delaney	/s/ R Hutchison (SEAL)
Michael J. Delaney, Secretary	Ronald B. Hutchison, Executive Vice President and Chief Financial Officer

No. 14-1382

In The
Supreme Court of the United States

AMERICOLD LOGISTICS, LLC,
and AMERICOLD REALTY TRUST,

Petitioners,

v.

CONAGRA FOODS, INC.,
and SWIFT-ECKRICH, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS CONAGRA FOODS, INC.'S AND SWIFT-ECKRICH, INC.'S BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JOHN M. DUGGAN
Counsel of Record
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CORPORATE DISCLOSURE

Swift-Eckrich, Inc. is a wholly-owned subsidiary of ConAgra Foods, Inc. f/k/a ConAgra, Inc. No publicly held company owns ten percent or more of ConAgra's stock.

REASONS FOR GRANTING THE PETITION

A. Certiorari jurisdiction exists to clarify the law. Here, the Circuit Courts are deeply divided regarding a trust's citizenship for diversity jurisdiction purposes. Supreme Court review is necessary to resolve the circuit split.

Certiorari jurisdiction exists to clarify the law. *City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015). Thus, writ of certiorari review may be exercised when the Circuits are split on the same important matter. Sup. Ct. R. 10(a).

Here, the Circuits are divided on the appropriate test for determining a trust's citizenship for diversity jurisdiction purposes. Petitioners' Petition for Writ of Certiorari adequately elucidates the split. The circuit split rests on differing interpretations of the Court's opinions in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) and *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), and their application to suits involving a trust, rather than the trustee(s).

After the Court's decision in *Carden*, the First, Second, Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeals all decided, relying on *Navarro*, that the trustees' citizenship determines the trust's citizenship. *See Erlich v. Ouellette, Labonte, Roberge & Allen, P.A.*, 637 F.3d 32, 34 n.2 (1st Cir. 2011); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 931 (2d Cir. 1998); *Mullins v. TestAmerica,*

Inc., 564 F.3d 386, 397 n.6 (5th Cir. 2009); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 F. App'x 731, 732 (6th Cir. 2002) (unpublished); *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

The Third, Eleventh, and (most recently) Tenth Circuit Courts of Appeals, however, disagree. Contrary to the majority view, these Circuits have held *Carden* dictates that a trust's citizenship should be determined by the trust's "members," and such "membership" should include more than just the trustees. *See Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 201 (3d Cir. 2007); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1338–40 (11th Cir. 2002); *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1178–81 (10th Cir. 2015), *as amended* (Jan. 27, 2015). There is even disagreement within this minority position as to which individuals constitute a trust's "membership." *See Emerald Investors Trust*, 492 F.3d at 200–05 (examining "[t]he four alternatives" and finding both the trustees' and beneficiaries' citizenship controls); *Riley*, 292 F.3d at 1338–40 (finding the beneficiaries' citizenship alone controls); *ConAgra*, 776 F.3d at 1181–82 (finding, "at a minimum, a trust's membership includes the trust's beneficiaries," but not deciding whether it also includes the trustees).

The Tenth Circuit's decision below deepened a clear circuit split which Respondents agree the United

States Supreme Court should grant certiorari to resolve. *See* Sup. Ct. R. 10(a).

B. Diversity jurisdiction rules should not "invite extensive threshold litigation" or be "administered in different ways in different parts of the country." The law concerning a trust's right to access federal courts is in disarray, inviting needless threshold litigation reaching different results depending on locality. A writ of certiorari is warranted.

In *Navarro*, the Court stressed "'[i]t is of first importance to have [diversity jurisdiction rules] [that] will not invite extensive threshold litigation over jurisdiction.'" *See Navarro*, 446 U.S. at 464 n.13 (quoting American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 128 (1969)). "'Jurisdiction should be as self-regulated as breathing; litigation over whether the case is in the right court is essentially a waste of time and resources.'" *Id.* (quoting Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968)).

As Petitioners aptly point out, the law governing a trust's ability to litigate in federal courts is presently in a state of "mass confusion and dissension in the lower courts." Jonathan J. Ossip, Diversity Jurisdiction and Trusts, 89 N.Y.U. L. Rev. 2301, 2334 (2014). Without this Court's guidance, extensive threshold

diversity jurisdiction litigation will continue, further wasting valuable judicial time and resources.

Moreover, "federal law is being administered in different ways in different parts of the country; citizens in some circuits are subject to entitlements that citizens in other circuits are not entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 1039, 110 S. Ct. 3302 (Mem.), 3303, 111 L. Ed. 2d 811 (1990) (White, J., dissenting) (denial of petition for writ of certiorari). Supreme Court review is necessary to resolve this matter of public importance that has divided the Circuit Courts of Appeals. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (granting writ of certiorari appropriate "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals").

CONCLUSION

For the foregoing reasons, Respondents ConAgra Foods, Inc. and Swift-Eckrich, Inc. request that this Court grant review of the Tenth Circuit Court of Appeals' holding that the District Court lacked subject matter jurisdiction over the suit underlying this appeal.

Respectfully submitted,

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DERON A. ANLIKER
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Supreme Court, U.S.
FILED
NOV 23 2015
OFFICE OF THE CLERK

No. 14-1382

In The Supreme Court of the United States

AMERICOLD LOGISTICS, LLC and
AMERICOLD REALTY TRUST,

Petitioners,

v.

CONAGRA FOODS, INC. and SWIFT-ECKRICH, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 15, 2015
Certiorari Granted October 1, 2015

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APPEAL

U.S. District Court
DISTRICT OF KANSAS (Kansas City)
CIVIL DOCKET FOR CASE
#: 2:13-cv-02064-JWL-KGS

Conagra Foods, Inc. et al v. Americold Logistics, LLC et al
Assigned to: District Judge John W. Lungstrum
Referred to: Magistrate Judge K. Gary Sebelius
Demand: $999,000
Case in other court: District Court of Wyandotte County, Kansas, 12-CV-1428 10CCA, 13-03277
Cause: 28:1441 Petition for Removal – Breach of Contract

Date Filed: 02/07/2013
Date Terminated: 10/04/2013
Jury Demand: Defendant
Nature of Suit: 190 Contract: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
02/07/2013	1	NOTICE OF REMOVAL from District Court of Wyandotte County, Kansas, case number 12-CV-1428, filed by Americold Realty Trust, Americold Logistics, LLC. (Attachments: # 1 State Court Records, # 2 Exhibit B) (ta) (Entered: 02/07/2013)
03/04/2013	7	STATE COURT RECORDS from District Court of Wyandotte County, Kansas. (Attachments: #1 Exhibit A)(Pospisil, Michael) (Entered: 03/04/2013)

07/24/2013	30	STIPULATION of Facts by Conagra Foods, Inc., Swift – Eckrich, Inc. (Attachments: # 1 Exhibit A to Stipulation of Facts, # 2 Exhibit B to Stipulation of Facts, # 3 Exhibit C to Stipulation of Facts)(Anliker, Deron) (Entered: 07/24/2013)
07/24/2013	31	INDEX OF EXHIBITS by Plaintiffs Conagra Foods, Inc., Swift – Eckrich, Inc. re: 30 Stipulation. (Anliker, Deron) (Entered: 07/24/2013)
10/04/2013	44	MEMORANDUM AND ORDER granting 35 Defendants' Motion for Summary Judgment and denying 37 Plaintiffs' Motion for Summary Judgment. Signed by District Judge John W. Lungstrum on 10/4/2013. (ses) (Entered: 10/04/2013)
10/04/2013	45	JUDGMENT pursuant to the Memorandum and Order filed on October 4, 2013. Signed by District Judge John W. Lungstrum on 10/4/2013. (mm) (Entered: 10/04/2013)
11/04/2013	46	NOTICE OF APPEAL as to 45 Judgment, 44 Order on Motion for Summary Judgment, by Plaintiffs Conagra Foods, Inc., Swift-Eckrich, Inc. Filing fee $455, Internet Payment Receipt Number 1083-2888953. (Anliker, Deron) (Entered: 11/04/2013)
07/04/2015	54	MOTION for Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b)(4) by

		Plaintiffs Kraft Foodservice, Inc., Safeway, Inc. (Gotfredson, William) (Motion title modified on 7/6/2015. (mg)) (Entered: 07/04/2015)
07/17/2015	55	RESPONSE/OPPOSITION by Defendants Americold Logistics, LLC, Americold Realty Trust re: 54 MOTION for Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b)(4). (Pospisil, Michael) (Entered: 07/17/2015)
08/21/2015	56	MEMORANDUM AND ORDER – Plaintiff Kraft Foodservice, Inc. and Safeway, Inc.'s motion for relief from judgment 54 is dismissed without prejudice. Signed by District Judge John W. Lungstrum on 08/21/2015. (ses) (Entered: 08/21/2015)

General Docket
Tenth Circuit Court of Appeals

Court of Appeals Docket #: 13-3277 **Docketed:** 11/05/2013 **Termed:** 01/27/2015
Nature of Suit:
3190 Other Contract Actions
Conagra Foods, et al v.
Americold Logistics, et al
Appeal From: United States District Court for the District of Kansas – Kansas City
Fee Status: Fee Paid

10/07/2014 [10213411] Order filed by Clerk of the Court (CW) – At the direction of the panel of judges who will hear and decide the merits of this appeal. Supplemental brief due 10/17/2014 for Appellees Americold Logistics, LLC and Americold Realty Trust (please see order for further details). The supplemental brief shall be no longer than 20 pages in a 13-point font, and should be filed via the court's ECF system. No hard copies need be filed. The appellant may file a response brief not exceeding 20 pages within 7 days of service of the supplemental brief. Served on 10/07/2014. [13-3277]

10/17/2014 [10216106] Appellee/Respondent's supplemental brief filed by Americold Logistics, LLC and Americold Realty Trust. No paper copies to be provided to the court (per order). Served on 10/17/2014. Manner of Service: email. This pleading

	complies with all required (privacy, paper copy and virus) certifications: Yes. [13-3277] – [Edited number of copies 10/17/2014 by SLS.] MDP
10/24/2014	[10218297] Appellant/Petitioner's supplemental brief filed by Conagra Foods, Inc. and Swift-Eckrich, Inc.. Served on 10/24/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-3277] [Edited to reflect proper relief – Edited 10/24/2014 by NA] DAA
11/19/2014	[10225716] Case argued by John Duggan for the Appellant; Michael Pospisil for the Appellee; and submitted to Judges Lucero, Murphy and McHugh. [13-3277]
01/27/2015	[10242913] Remanded; Terminated on the merits after oral hearing; Written, signed, published; Judges Lucero, Murphy (authoring) and McHugh. Mandate to issue. [13-3277] – [Edited by SLS to note that an amended decision was issued on 04/09/2015 nunc pro tunc 01/27/2015.]
01/27/2015	[10242919] Judgment for opinion filed. [13-3277]
02/09/2015	[10246595] Petition filed by Appellees Americold Logistics, LLC and Americold Realty Trust for rehearing en banc. Served on: 02/09/2015. Manner of service: email. This pleading complies with all required (privacy, paper copy and

virus) certifications: Yes. [13-3277] [Edited to reflect proper relief and to add native PDF – Edited 02/09/2015 by NA] MDP

02/09/2015 [10246709] Petition for rehearing filed by Americold Realty Trust. Served on 02/09/2015. Manner of Service: email. [13-3277] [Procedural entry

02/23/2015 [10250042] Order filed by Judges Lucero, Murphy and McHugh denying petition for rehearing and for rehearing en banc filed by Appellees Americold Logistics, LLC and Americold Realty Trust. [13-3277]

03/23/2015 [10257500] Order filed by Judges Lucero, Murphy and McHugh granting appellees' motion staying issuance of the mandate until 06/22/2015. If a notice from the Supreme Court clerk is filed during the stay period indicating appellees have filed a petition for certiorari, the stay will continue until the Supreme Court's final disposition. Served on 03/23/2015. [13-3277]

04/09/2015 [10262654] Published order filed by Judges Lucero, Murphy and McHugh sua sponte to amend the opinion issued on 01/27/2015. A copy of the new opinion is attached. Issuance of the mandate is stayed as directed in the order of 03/23/2015. [13-3277] – [Edited 04/09/2015 by JM to correct event code.]

04/09/2015	[10262655] Amendment to opinion pursuant to [10262654-2] order filed by Judges Lucero, Murphy and McHugh. [13-3277]
05/26/2015	[10274384] Petition for writ of certiorari filed by Americold Logistics on 05/15/2015 and placed on the docket 05/22/2015 as Supreme Court Number 14-1382. [13-3277]
10/01/2015	[10307022] Supreme court order dated 10/01/2015 granting certiorari filed. [13-3277]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CONAGRA FOODS, INC. F/K/A CONAGRA, INC. and SWIFT-ECKRICH, INC. and KRAFT FOODSERVICE, INC. and SAFEWAY, INC. and PHILLIPS CONNECTIONS, INC. D/B/A PHILLIPS CONNECTIONS AND HANOVER, INC. Plaintiffs, v. AMERICOLD LOGISTICS, LLC and AMERICOLD REALTY TRUST Defendants.	Case No. 13-cv-2064 RDR/KGS

DEFENDANTS' NOTICE OF REMOVAL

(Filed Feb. 7, 2013)

COMES NOW Defendants Americold Logistics, LLC and Americold Realty Trust (collectively "Defendants"), by and through its counsel of record, and

pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, and D.Kan. Rule 81.1(a), hereby remove this case from the District Court of Wyandotte County, Kansas, to the United States District Court of Kansas. As grounds for removal, and for no other purpose, Defendants state as follows:

1. On or about September 24, 2012, Plaintiffs commenced this action against Defendants in the District Court of Wyandotte County, Kansas styled *ConAgra Foods, Inc., et al. v. Americold Logistics, LLC, et al.* Case No. 12-CV-1428.

2. Plaintiffs served Americold Logistics, LLC on January 13, 2013 and Americold Realty Trust on January 22, 2013.

3. Plaintiffs' Petition seeks tens of millions of dollars in damages. *See* Petition, p. 20.

4. Plaintiffs are all incorporated in the State of Delaware. *See* Petition at ¶¶ 1-5.

5. Americold Realty Trust is a Maryland real estate investment trust. *See* Petition at ¶ 6.

6. None of the Plaintiffs are incorporated in or have their principal place of business in Maryland. *See* Petition at ¶¶ 1-5.

7. Americold Logistics, LLC is a limited liability company. It is well-settled law that, for purposes of diversity jurisdiction, a limited liability company is treated as a limited partnership. The citizen of a limited partnership "is deemed to be that of the persons

composing such association." *Kalian at Poconos, LLC v. Saw Creek Estates Community Association, Inc., et al.*, 275 F.Supp.2d 578, 586 (M.D. Pa., 2003) (quoting *Pippett v. Waterford Dev., LLC*, 166 F.Supp.2d 233, 236, (E.D.pa., 2001); *See Carden v. Arkoma, Assocs.*, 494 U.S. 185, 187-92, 110 S.Ct. 1015 (1990) (holding that only corporations, and not other business entities such a [sic] limited partnerships, are considered citizens of the state which created it).

8. Americold Logistics, LLC is a wholly owned subsidiary of Americold Realty Trust. *See* Petition at ¶ 57.

9. As such, its state of citizenship is also that of Maryland.

10. Neither Americold Logistics, LLC nor Americold Realty Trust is a citizen of Kansas, the forum state.

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 in that this action is between the citizens of different States, and the amount of controversy is in the excess of $75,000. *See* Petition at p. 20. The Petition demonstrates that this Court has original jurisdiction, by virtue of diversity.

12. This Notice of Removal is timely under 28 U.S.C. § 1446(b). It is being filed within 30 days of service of process on Defendants. The time within which to answer or otherwise respond to Plaintiffs' Petition has not expired, and no further proceedings have taken place in the state court lawsuit.

13. Venue is proper because Plaintiffs' state court action is pending within a Kansas Judicial District within the geographic confines of this District. 28 U.S.C. § 1441(a).

14. Pursuant to 28 U.S.C. § 1446(a), attached hereto as *Exhibit A* and incorporated by references are copies of the Summons and Petition, which constitute all process, pleadings, and orders in this matter. Pursuant to D. Kan. Rule 81.2, Defendants will file a copy of all records and proceedings – if any – had in state court with this Court within 21 days of removal.

15. Defendants shall, promptly upon filing this Notice of Removal, give written notice thereof to Plaintiffs and file a copy of this Notice of Removal with the District Court of Wyandotte County, Kansas, as required by 28 U.S.C. § 1446(d) and D. Kan. Rule 81.1(c). A copy of the Notice of Filing Notice of Removal (without attachments) is incorporated herein and attached hereto as *Exhibit B.*

WHEREFORE, Defendants hereby exercises [sic] their right of removal pursuant to 28 U.S.C. § 1441 *et seq.* and give notice that the action now pending in the District Court of Wyandotte County, Kansas, captioned *ConAgra Foods, Inc., et al. v. Americold Logistics, LLC, et al.* Case No. 12-CV-1428, is removed from that court to the United States District Court for the District of Kansas. Defendants respectfully requests [sic] that this Court assume full jurisdiction over the cause herein as provided by law.

Dated this 7th day of February, 2013.

Respectfully submitted,

EDGAR LAW FIRM LLC

/s/ Michael D. Pospisil

Michael D. Pospisil KS # 18540
John M. Edgar KS FED #70270
Edgar Law Firm LLC
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Kansas City, Missouri 64105
Telephone: (816) 531-0033
Facsimile: (816) 531-3322
Email: jme@edgarlawfirm.com
Email: mdp@edgarlawfirm.com

ATTORNEYS FOR DEFENDANTS

[Certificate Of Service Omitted]

EXHIBIT A

[LOGO] CT Corporation

Service of Process Transmittal
01/17/2013
CT Log Number 521963316

TO: Annie McCrory, Contract Administrator
AmeriCold Logistics LLC
10 Glenlake Parkway South, Suite 800
Atlanta, GA 30328-

RE: **Process Served in Kansas**

FOR: Americold Logistics, LLC (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: Conagra Foods, Inc., etc., et al., Pltfs. vs. Americold Logistics, LLC and Americold Realty Trust, Dfts.

DOCUMENT(S) SERVED:
Summons, Petition, Exhibit(s)

COURT/AGENCY: Johnson County District Court, KS
Case # 12CV1428

NATURE OF ACTION: Defendant failed to perform under the agreement and refused to execute stipulations of revivor as required by the agreement

ON WHOM PROCESS WAS SERVED:
The Corporation Company, Inc., Topeka, KS

DATE AND HOUR OF SERVICE:
By Certified Mail on
01/17/2013 postmarked on
01/16/2013

JURISDICTION SERVED:
Kansas

APPEARANCE OR ANSWER DUE:
Within 21 days after service,
exclusive of the day of service

ATTORNEY(S)/SENDER(S):
Deron A. Anilker
Duggan, Shadwick, Doerr &
Kurlbaum, P.C.
11040 Oakmont
Overland Park, KS 66210
913-498-3536

ACTION ITEMS:
SOP Papers with Transmittal,
via Fed Ex 2 Day,
794538346824
Email Notification,
Annie McCrory
annie.mccrory@americold.com

SIGNED: The Corporation Company, Inc.
PER: Amy McLaren
ADDRESS: 112 S.W. 7th Street
Suite 3C
Topeka, KS 66603

TELEPHONE: 800-592-9023

[/s/ D Deckbar
1/18/13]

Page 1 of 1 / RK

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

IN THE DISTRICT COURT
OF JOHNSON COUNTY
CIVIL COURT DEPARTMENT

CONAGRA FOODS, INC. F/K/A CONAGRA, INC.,	)	
Plaintiffs,	)	**Case No. 12CV1428**
v.	)	**Court No. 3**
	)	**K.S.A. Chapter 60**
AMERICOLD LOGISTICS, LLC,	)	
Defendants.	)	

SUMMONS

To the Defendant: **Americold Logistics, LLC**
c/o The Corporation Company
112 SW 7th Street, Ste. 3C
Topeka, Kansas 66603

You are hereby notified that an action has been commenced against you in this court. You are required to file your answer to the Petition with this court and serve a copy upon the plaintiff's attorney as follows:

Deron A. Anliker
Duggan, Shadwick, Doerr & Kurlbaum, P.C.
11040 Oakmont
Overland Park, Kansas 66210
(913) 498-3536

within twenty-one (21) days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the attached petition. As provided in subsection (a) of K.S.A. 60-213, and amendments thereto, your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

KATHLEEN M. COLLINS
Clerk of the District Court

(Seal)

Dated: 9-25-12

By /s/ [Illegible]

[LOGO] CT Corporation

Service of Process Transmittal
01/22/2013
CT Log Number
521983016

TO: Annie McCrory, Contract Administrator
AmeriCold Logistics LLC
10 Glenlake Parkway South, Suite 800
Atlanta, GA 30328-

RE: **Process Served in Kansas**

FOR: Americold Realty Trust (Domestic State: MD)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: Conagra Foods, Inc., etc., et al., Pltfs. vs. Americold Logistics, LLC and Americold Realty Trust, Dfts.

DOCUMENT(S) SERVED:
Summons, Petition, Exhibit(s), Attachment(s)

COURT/AGENCY: Johnson County District Civil Court Department, Case # 12CV14283

NATURE OF ACTION:
Breach of Contract – Specific Performance – Plaintiff made demand on Americold to execute stipulation of revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the agreement by refusing to execute stipulation of revivor as required by the agreement

ON WHOM PROCESS WAS SERVED:
The Corporation Trust Incorporated, Baltimore, MD

DATE AND HOUR OF SERVICE:
By Certified Mail on 01/22/2013 postmarked on 01/15/2013

JURISDICTION SERVED:
Maryland

APPEARANCE OR ANSWER DUE:
Within 21 days from date of service, exclusive of the date of service – Answer

ATTORNEY(S)/SENDER(S):
Deron A. Anilker
Duggan, Shadwick, Doerr & Kurlbaum, P.C.
11040 Oakmont
Overland Park, KS 66210
913-498-3536

ACTION ITEMS:
SOP Papers with Transmittal, via Fed Ex 2 Day, 794574981761
Email Notification, Annie McCrory
annie.mccrory@americold.com

SIGNED:
PER:
The Corporation Trust Incorporated
Billie Swoboda

ADDRESS:
351 West Camden Street
Baltimore, MD 21201

TELEPHONE:
410-539-2837

[Legal – /s/ D Deckbar 1/23/13]

Page 1 of 1 / SK

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nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

IN THE DISTRICT COURT OF
JOHNSON COUNTY
CIVIL COURT DEPARTMENT

CONAGRA FOODS, INC. F/K/A CONAGRA, INC.,	
Plaintiffs,	**Case No. 12CV1428**
v.	**Court No. 3**
AMERICOLD LOGISTICS, LLC,	**K.S.A. Chapter 60**
Defendants.	

SUMMONS

To the Defendant: **Americold Realty Trust**
c/o The Corporation Trust Incorporated
351 West Camden Street
Baltimore, MD 21201

You are hereby notified that an action has been commenced against you in this court. You are required

to file your answer to the Petition with this court and serve a copy upon the plaintiff's attorney as follows:

Deron A. Anliker
Duggan, Shadwick, Doerr & Kurlbaum, P.C.
11040 Oakmont
Overland Park, Kansas 66210
(913) 498-3536

within twenty-one (21) days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the attached petition. As provided in subsection (a) of K.S.A. 60-213, and amendments thereto, your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

KATHLEEN M. COLLINS

(Seal)

Clerk of the District Court

Dated: 9-25-12

By /s/ [Illegible]

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
CIVIL DIVISION

CONAGRA FOODS, INC. F/K/A CONAGRA, INC.	)	
and	)	
SWIFT-ECKRICH, INC.	)	Case No. 12CV1428
and	)	DIV#3
KRAFT FOODSERVICE, INC.	)	
and	)	
SAFEWAY, INC.	)	
and	)	
PHILLIPS CONFECTIONS, INC D/B/A PHILLIPS CONFECTIONS AND HANOVER, INC.	)	
Plaintiffs,	)	
v.	)	
AMERICOLD LOGISTICS, LLC 10 Glenlake Parkway, Ste. 800 Atlanta, Georgia 30328 Serve: The Corporation Company 112 SW 7th Street, Ste. 3C Topeka, Kansas 66603	)	
and	)	
AMERICOLD REALTY TRUST	)	
Defendants.	)	

PETITION

(Filed Sep. 24, 2012)

Plaintiffs ConAgra Foods, Inc. f/k/a ConAgra, Inc. ("ConAgra"), Swift-Eckrich, Inc. ("Swift"), Safeway, Inc. ("Safeway"), Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. ("Hanover"), and Kraft Foodservice, Inc. ("Kraft") for their Complaint against AmeriCold Logistics, LLC ("Logistics") and Americold Realty Trust (collectively "Americold"), state:

1. ConAgra is a Delaware corporation with its principal place of business in Nebraska.

2. Swift is a Delaware corporation with its principal place of business in Illinois.

3. Safeway is a Delaware corporation with its principal place of business in California.

4. Hanover is a Delaware corporation with its principal place of business in Massachusetts.

5. Kraft is Delaware corporation with its principal place of business in Illinois.

6. Logistics is a Delaware corporation with its principal place of business in Georgia and Americold Realty Trust is a Maryland real estate investment trust. Logistics and Americold Realty Trust are collectively referred to herein as "Americold".

7. Defendant is subject to this jurisdiction of this Court by transacting business in the state of

Kansas and because the transactions and events giving rise to the claims in this action occurred in the state of Kansas.

8. Venue is proper in this Court because a substantial part of the transactions and/or events giving rise to the claims in this action occurred in this judicial district.

Allegations Common to All Counts

9. On December 28, 1991, a fire was detected in Portal A of the underground storage facility (the "Facility") owned and operated by Americold Corporation.

10. Beginning in April 1992, various lawsuits were filed against Americold Corporation as a result of the fire at the Facility and eventually consolidated in both federal and state court.

11. The state court action styled *Associated Wholesale Grocers et al v. Americold Corporation, et al*, Case No. 92C4015 was pending in the District Court of Wyandotte County, Kansas ("the "Kansas Action").

12. On February 9, 1994, the state court and the United States District Court ordered the parties to participate in settlement conferences with federal magistrate Ronald Newman.

13. The first two days of the court-ordered settlement conferences took place on February 18 and

19, 1994, and the second session of the settlement conference commenced on March 8, 1994.

14. At the March 8, 1994 session, Plaintiffs herein and others[1] offered to settle for $40.75 million.

15. On March 10, 1994, a settlement was reached between Plaintiffs and Americold Corporation.

16. The settlement provided for the entry of a consent judgment in favor of the plaintiffs in the Kansas Action in the amount of $58,670,754.00[2] and a covenant not to execute by the plaintiffs in the Kansas Action on the personal assets of Americold Corporation.

17. The settlement agreement was completed in the summer of 1994 and included an assignment by Americold Corporation to Plaintiffs of Americold Corporation's right to seek recovery of insurance policy proceeds and amounts in excess of policy limits from excess carriers including Northwestern Pacific Indemnity Company ("NPIC"). A true and accurate

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[1] Additional plaintiffs were also involved in the Kansas Action and included Fleming, Inc., Arkwright Mutual Insurance Company, Doskocil Companies, Inc. for itself and as assignee of Industrial Risk Insurers and Wilson Foods Corporation.

[2] The settlement agreement's figure ($58,754,574.00) differs from the amount of the consent judgment in that Hartford Fire Insurance Company, whose claim was $83,820.00, opted not to pursue recovery and was not a party to the Kansas Action. The total claims of all plaintiffs who entered into the settlement agreement were $67 million.

copy of the settlement agreement ("Agreement") is attached hereto as Exhibit 1.

18. Pursuant to the Agreement, Americold Corporation agreed to "execute any additional documents necessary to effectuate the purpose and intent of this Agreement or to pursue the assigned claims or execute on the judgments obtained by Plaintiffs."

19. On March 15, 1994, NPIC filed a declaratory judgment action in the District Court of Johnson County, Kansas against Americold and the plaintiffs in the Kansas Action. The action sought a declaration that (1) the NPIC policy provided no coverage; (2) NPIC had no duty to defend or indemnify Americold for the pending lease claims; and (3) if any coverage existed, it was excess to any coverage available to Americold under the tenant liability policies. .

20. On April 12, 1994, NPIC filed an amended petition for declaratory judgment in the District Court of Johnson County, Kansas.

21. In September 1994, after consent judgments were entered in favor of plaintiffs in the Kansas Action and against Americold in the total amount of $58,670,754.00, plaintiffs in the Kansas Action commenced garnishment proceedings against NPIC and TIG Insurance Company ("TIG").

22. A judgment was entered in favor of ConAgra and Swift in the District Court of Wyandotte County, Kansas on September 8, 1994 in the amount of $7,386,142.00.

23. A judgment was entered in favor of Safeway in the District Court of Wyandotte County, Kansas on August 17, 1994 in the amount of $5,283,027.00.

24. A judgment was entered in favor of Hanover in the District Court of Wyandotte County, Kansas on August 25, 1994 in the amount of $143,876.00.

25. A judgment was entered in favor of Kraft in the District Court of Wyandotte County, Kansas on August 17, 1994 in the amount of $4,930,373.00.

26. NPIC served its answer to the garnishment action on or about October 27, 1994.

27. Plaintiffs each filed a separate Reply to NPIC's and TIG's garnishment answers denying the allegations set forth in said garnishment answers and setting forth the Plaintiffs' contentions and theories of recovery against NPIC and TIG.

28. In June 1995, after discovery closed in the garnishment proceeding, plaintiffs in the Kansas Action moved for summary judgment. NPIC, in turn, filed four separate summary judgment motions claiming: (1) the absolute pollution exclusion precluded coverage; (2) the settlement agreement between Americold and Defendants, entered into without NPIC's consent, violated the NPIC policy provisions; (3) NPIC is not liable over the $25 million policy limit; and (4) the tenants' liability insurance is primary to NPIC's coverage.

29. In support of its motions and in response to Defendants' motions, NPIC filed six (6) separate

briefs (of over 130 pages) and 54 exhibits (of over 900 pages). The district court also held a full day hearing on June 2, 1995 on the motions for summary judgment.

30. On September 20, 1995, the district court in the Kansas Action entered judgments in favor of the plaintiffs in the Kansas Action and against NPIC and TIG in the amount of $58,670,754.00 plus interest. The district court held that NPIC was liable for the first $25 million (its policy limits), and that NPIC and TIG were jointly and severally liable for all amounts above policy limits.

31. On October 12, 1995, the district court filed a journal entry clarifying its September 20, 1995 journal entry by listing the exact dollar amounts owed by NPIC and TIG to each plaintiff in the Kansas Action.

32. NPIC and TIG appealed the district court's decision to the Supreme Court of Kansas. However, after filing its appellate brief, TIG settled with plaintiffs for its policy limits of $15 million and dismissed its appeal. NPIC thereafter settled claims asserted by Arkwright Mutual Insurance Company, the Doskocil Companies, and Wilson Foods.

33. On appeal, the Supreme Court of Kansas identified the following issues: (1) does the absolute pollution exclusion in the NPIC policy apply to eliminate coverage for plaintiffs' claims; (2) did plaintiffs carry their burden of proof that their damages resulted from an "occurrence" within the NPIC policy and

that the "other insurance" provision in the NPIC policy was satisfied; (3) is NPIC bound by the $58,670,754.00 settlement agreement reached by Americold and plaintiffs or, on summary judgment, do material issues of fact remain as to the reasonableness and good faith of the agreement; (4) did the district court improperly impose bad faith liability on NPIC for damages above policy limits; and (5) did the district court improperly increase the amount of the judgment after entering summary judgment against NPIC?

34. On March 7, 1997, the Supreme Court of Kansas issued its decision holding that: (1) the absolute pollution exclusion in the NPIC policy does not exclude coverage; (2) the occurrence issue was not advanced in the district court and is not properly before the court on appeal, and NPIC failed to raise any material issues of fact regarding the application of other insurance; and (3) material issues of fact remained regarding the (a) reasonableness of the policy limits settlement offer, (b) the reasonableness of the Americold settlement agreement, and (3) NPIC's bad faith liability in denying coverage and refusing to settle within policy limits.

35. The Supreme Court of Kansas affirmed in part, reversed in part, and remanded the case to the district court.

36. Following the remand, NPIC filed a motion to convert the garnishment action into a breach of contact action on May 20, 1997 and engaged new

counsel, Cozen and O'Connor. Defendants opposed the admission of Cozen and O'Connor because an implied attorney client relationship existed between the Defendants herein and a member of Cozen and O'Connor.

37. The district court granted the Plaintiffs' motion for disqualification, and NPIC appealed the decision. NPIC sought and obtained a stay of discovery in the Kansas Action pending resolution of the appeal. On March 5, 1999, the Supreme Court of Kansas reversed the district court's decision disqualifying the firm of Cozen and O'Connor from representing NPIC in the Kansas Action.

38. NPIC then filed a motion for change of judge pursuant to K.S.A. 20-311d (a) on April 22, 1999. The district court denied NPIC's motion. The Supreme Court of Kansas assigned Judge David J. King, Chief Judge of the 1st Judicial District of Kansas, to consider the affidavit of disqualification filed by NPIC.

39. On July 28, 1999, Judge King in his Order Determining Sufficiency of Affidavit of Disqualification, Pursuant to K.S.A. 20-311d ruled that the affidavit of disqualification was legally insufficient and therefore, NPIC's request to disqualify Judge Sieve was denied.

40. After NPIC's request to disqualify Judge Sieve was resolved, the district court heard oral argument on NPIC's motion to convert the garnishment action

into a breach of contract action. The district court denied NPIC's motion.

41. The Kansas Action ultimately proceeded to trial and a ten-week bench trial was conducted with Judge Sieve of the District Court of Wyandotte County, Kansas in the fall of 2005. The trial commenced on September 12, 2005 and concluded on November 15, 2005.

42. On the last day of the ten-week trial, NPIC sought to dismiss the garnishment proceedings on the grounds that the district court lacked subject matter jurisdiction to conduct the garnishment proceedings because the consent judgments had become dormant and extinct pursuant to K.S.A. 60-2403 and 60-2404.

43. On January 19, 2006, the district court entered its journal entry denying NPIC's motion to dismiss the garnishment proceedings and ultimately entered a journal entry on February 16, 2007 setting forth the district court's findings of fact and conclusions of law and principally finding that the settlement agreement between the Plaintiffs and Americold Corporation represented a reasonable settlement and that NPIC's denial of coverage and refusal to participate in the settlement conferences and refusal to settle within policy limits were in bad faith.

44. On or about August 27, 2007, separate journal entries of judgment were entered against NPIC.

45. On or about August 27, 2007, a journal entry of judgment was entered in favor of ConAgra and Swift and against NPIC in the amount of $14,930,626.66 plus post-judgment interest until the judgment is satisfied.

46. On or about August 27, 2007, a journal entry of judgment was entered in favor of Safeway and against NPIC in the amount of $12,235,150.84 plus post-judgment interest until the judgment is satisfied.

47. On or about August 27, 2007, a journal entry of judgment was entered in favor of Kraft and against NPIC in the amount of $8,365,478.77 plus post-judgment interest until the judgment is satisfied.

48. On or about August 27, 2007, a journal entry of judgment was entered in favor of Hanover and against NPIC in the amount of $250,823.21 plus post-judgment interest until the judgment is satisfied.

49. NPIC filed a notice of appeal with the Kansas Court of Appeals and the appeal was transferred to the Kansas Supreme Court.

50. On December 23, 2011, almost 3 years after oral argument was held before the Kansas Supreme Court, the Kansas Supreme Court issued its opinion, with two justices in dissent, ruling that "the underlying judgments against Americold were extinguished pursuant to K.S.A. 60-2403, thus depriving the

district court of jurisdiction to proceed with this garnishment action."

51. The Kansas Supreme Court reversed the district court and remanded the matter to the district court to dismiss without prejudice the garnishment proceedings.

52. The Kansas Supreme Court did "not reach[ ] the merits of NPIC's issues of bad faith or the reasonableness of Americold's settlement."

53. On June 20, 2012, the District Court of Wyandotte County entered its journal entry dismissing the garnishment action without prejudice and vacating the judgments entered on [sic] favor of Plaintiffs and against NPIC.

54. On or about December 31, 2002, at 11:58 p.m., Americold Corporation, an Oregon corporation, merged with and into Americold Corporation of Maryland, Inc., a Maryland corporation, with Americold Corporation of Maryland Inc. the surviving corporation. (*See* Certified Plan and Agreement of Merger from the Office of Secretary of State of the State of Oregon for Americold Corporation merging with and into Americold Corporation of Maryland, Inc. attached hereto as Exhibit 2; *See also* Certified Articles of Merger from the State of Maryland merging Americold Corporation into Americold Corporation of Maryland, Inc. attached hereto as Exhibit 3.)

55. Thereafter, on or about December 31, 2002, at 11:59 p.m., Americold Corporation of Maryland,

Inc., a Maryland corporation merged with and into Americold Realty Trust, a Maryland real estate investment trust, with Americold Realty Trust the surviving entity. (*See* Certified Articles of Merger from the State of Maryland merging Americold Corporation of Maryland, Inc. into Americold Realty Trust attached hereto as Exhibit 4.)

56. On or about November 4, 2004, Americold Realty Trust purchased AmeriCold Logistics, and AmeriCold Logistics became a wholly owned subsidiary of Americold Realty Trust.

57. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

58. The parties' intent has been and is that the judgments of the Plaintiffs recited in paragraphs 45 through 48 were to remain in full force and effect until such time as the assets of Americold Corporation in the possession of Northwestern Pacific Indemnity Company were adjudicated and fully collected pursuant to collection proceedings in the State of Kansas.

59. Pursuant to the Agreement, Plaintiffs made demand on AmeriCold Logistics, LLC to execute Stipulations of Revivor consistent with K.S.A. 60-2404, but AmericCold [sic] Logistics, LLC refused and continues to refuse to execute Stipulations of Revivor as required by the Agreement.

COUNT I

(Breach of Contract – Specific Performance)

60. Plaintiffs incorporate the allegations continued in paragraphs 1 through 59 as if fully set forth herein.

61. Plaintiffs and Americold Corporation entered into the Agreement.

62. Plaintiffs performed under the terms of the Agreement.

63. Pursuant to the Agreement, Americold Corporation agreed to "execute any additional documents necessary to effectuate the purpose and intent of this Agreement or to pursue the assigned claims or execute on the judgments obtained by Plaintiffs."

64. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

65. Pursuant to the Agreement, Plaintiffs made demand on Americold to execute Stipulations of Revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the Agreement by refusing to execute Stipulations of Revivor as required by the Agreement.

66. Americold is in breach of the Agreement.

67. Americold's failure to perform under the Agreement has resulted in irreparable harm to the Plaintiffs for which no adequate remedy at law exists.

68. The Plaintiffs are entitled to specific performance of the Agreement by Americold.

WHEREFORE, Plaintiffs pray this Court for its order directing Defendants AmeriCold Logistics, LLC and Americold Realty Trust to perform specifically AmeriCold Logistics, LLC's and Americold Realty Trust's obligations under the Agreement by signing Stipulations of Revivor concerning Plaintiffs' judgments entered in 1994; and for such other and further relief as this Court deems just and proper.

COUNT II
(Breach of Contract)
(ConAgra/Swift)

69. Plaintiffs incorporate the allegations continued in paragraphs 1 through 68 as if fully set forth herein.

70. Plaintiffs ConAgra and Swift and Americold Corporation entered into Agreement.

71. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

72. Pursuant to the Agreement, Plaintiffs made demand on Americold to execute Stipulations of Revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the Agreement by refusing to execute Stipulations of Revivor as required by the Agreement.

73. Plaintiffs ConAgra and Swift performed and are prepared to perform under the Agreement.

74. Americold is in breach of the Agreement.

75. Americold's breach of the Agreement has resulted in damages to Plaintiffs ConAgra and Swift.

WHEREFORE, Plaintiffs ConAgra Foods, Inc. and Swift-Eckrich, Inc. pray this Court enter judgment in favor of said Plaintiffs and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, in the amount of $14,930,626.66; for prejudgment and post-judgment interest as provided by law; for said Plaintiffs' costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT III
(Breach of Contract)
(Safeway)

76. Plaintiffs incorporate the allegations continued in paragraphs 1 through 75 as if fully set forth herein.

77. Plaintiff Safeway and Americold Corporation entered into Agreement.

78. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

79. Pursuant to the Agreement, Plaintiff Safeway made demand on Americold to execute a Stipulation

of Revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the Agreement by refusing to execute a Stipulation of Revivor as required by the Agreement.

80. Plaintiff Safeway performed and is prepared to perform under the Agreement.

81. Americold is in breach of the Agreement.

82. Americold's breach of the Agreement has resulted in damages to Plaintiff Safeway.

WHEREFORE, Plaintiff Safeway, Inc. prays this Court enter judgment in favor of said Plaintiff and against Defendant AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, in the amount of $12,235,150.84; for prejudgment and post-judgment interest as provided by law; for said Plaintiff's costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT IV
(Breach of Contract)
(Kraft)

83. Plaintiffs incorporate the allegations continued in paragraphs 1 through 82 as if fully set forth herein.

84. Plaintiff Kraft and Americold Corporation entered into Agreement.

85. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

86. Pursuant to the Agreement, Plaintiff Kraft made demand on Americold to execute a Stipulation of Revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the Agreement by refusing to execute a Stipulation of Revivor as required by the Agreement.

87. Plaintiff Kraft performed and is prepared to perform under the Agreement.

88. Americold is in breach of the Agreement.

89. Americold's breach of the Agreement has resulted in damages to Plaintiff Kraft.

WHEREFORE, Plaintiff Kraft Foodservice, Inc. prays this Court enter judgment in favor of said Plaintiff and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, in the amount of $8,365,478.77; for prejudgment and post-judgment interest as provided by law; for said Plaintiff's costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT V
(Breach of Contract)
(Phillips Confections/Hanover)

90. Plaintiffs incorporate the allegations continued in paragraphs 1 through 89 as if fully set forth herein.

91. Plaintiff Hanover and Americold Corporation entered into Agreement.

92. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

93. Pursuant to the Agreement, Plaintiff Hanover made demand on Americold to execute a Stipulation of Revivor consistent with K.S.A. 60-2404, but Americold refused and continues to refuse to perform under the terms of the Agreement by refusing to execute a Stipulation of Revivor as required by the Agreement.

94. Plaintiff Hanover performed and is prepared to perform under the Agreement.

95. Americold is in breach of the Agreement.

96. Americold's breach of the Agreement has resulted in damages to Plaintiff Hanover.

WHEREFORE, Plaintiff Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. prays this Court enter judgment in favor of said Plaintiff and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, in the amount of $250,823.21; for prejudgment

and post-judgment interest as provided by law; for said Plaintiff's costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT VI

(Breach of the Duty of Good Faith and Fair Dealing)

97. Plaintiffs incorporate the allegations continued in paragraphs 1 through 96 as if fully set forth herein.

98. Plaintiffs entered into the Agreement with Americold.

99. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

100. In connection with the Agreement, Americold had a duty to act in good faith and deal fairly in the performance and enforcement of all said agreements.

101. Americold [sic] the duty of good faith and fair dealing by refusing to execute the Stipulations of Revivor.

102. As a direct result of Americold's breach of the duty of good faith and fair dealing, the Plaintiffs have been damaged.

WHEREFORE, Plaintiffs ConAgra, Inc., Swift-Eckrich, Inc., Safeway, Inc., Kraft Foodservice, Inc., and Phillips Confections, Inc. d/b/a Phillips Confections

and Hanover, Inc. pray this Court enter judgment in favor of said Plaintiffs and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, as follows: (1) judgment for ConAgra and Swift in the amount of $14,930,626.66; (2) judgment for Safeway in the amount of $12,235,150.84; (3) judgment for Kraft in the amount of $8,365,478.77; (4) judgment for Hanover in the amount of $250,823.21; for prejudgment and post judgment interest as provided by law on each of these judgments; for said Plaintiffs' costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT VII
(Promissory Estoppel)

103. Plaintiffs incorporate the allegations continued in paragraphs 1 through 102 as if fully set forth herein.

104. As set out above, Plaintiffs and Americold reached an agreement which had clear and definitive terms requiring the cooperation of Americold in connection with the judgments entered in favor of Plaintiffs.

105. Plaintiffs reasonably relied upon Americold Corporation's representations that the agreement was reached.

106. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

107. The equities support the enforcement of the agreement.

108. Plaintiffs will suffer damages and an injustice will result if Americold Corporation's representations and promises are not enforced and Americold is allowed to repudiate those representations and promises to Plaintiffs.

WHEREFORE, Plaintiffs ConAgra, Inc., Swift-Eckrich, Inc., Safeway, Inc., Kraft Foodservice, Inc., and Phillips Confections, Inc. d/b/ a Phillips Confections and Hanover, Inc. pray this Court enter judgment in favor of said Plaintiffs and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, as follows: (1) judgment for ConAgra and Swift in the amount of $14,930,626.66; (2) judgment for Safeway in the amount of $12,235,150.84; (3) judgment for Kraft in the amount of $8,365,478.77; (4) judgment for Hanover in the amount of $250,823.21; for prejudgment and post-judgment interest as provided by law on each of these judgments; for said Plaintiffs' costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

COUNT VIII
(Equitable Estoppel)

109. Plaintiffs incorporate the allegations continued in paragraphs 1 through 108 as if fully set forth herein.

110. Americold Corporation represented to Plaintiffs that Americold Corporation intended to cooperate with Plaintiffs in connection with the judgments entered in favor of Plaintiffs.

111. AmeriCold Logistics, LLC, as wholly owned subsidiary of Americold Realty Trust, is the legal successor to Americold Corporation.

112. Through these representations, Americold Corporation induced Plaintiffs to enter into the settlement agreement and to forbear pursuing action against Americold Corporation.

113. Americold now claims that it may refuse to cooperate with Plaintiffs in connection with the judgments entered in favor of Plaintiffs.

114. Americold is equitably stopped from making such representations and then seeking to renege on promises made.

115. Plaintiffs must be awarded damages to avoid the injustice which will result if Americold is allowed to repudiate its representations to Plaintiffs.

WHEREFORE, Plaintiffs ConAgra, Inc., Swift-Eckrich, Inc., Safeway, Inc., Kraft Foodservice, Inc., and Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. pray this Court enter judgment in favor of said Plaintiffs and against Defendants AmeriCold Logistics, LLC and Americold Realty Trust, and each of them, as follows: (1) judgment for ConAgra and Swift in the amount of $14,930,626.66; (2) judgment for Safeway in the

amount of $12,235,150.84; (3) judgment for Kraft in the amount of $8,365,478.77; (4) judgment for Hanover in the amount of $250,823.21; for prejudgment and post-judgment interest as provided by law on each of these judgments; for said Plaintiffs' costs and expenses incurred herein; and for any and all other relief that this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all issues so triable.

Respectfully submitted,

DUGGAN, SHADWICK, DOERR
& KURLBAUM
A Professional Corporation

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EXHIBIT

1

1. AGREEMENT

1.0 This Agreement is made as of March 10, 1994, by the parties identified in this Agreement as "Plaintiffs" and "Americold." This Agreement reflects an agreement between each individual plaintiff and Americold and does not, unless specifically stated, set forth an agreement between or among the plaintiffs. The Agreement between Americold and each plaintiff is complete upon execution of this document by Americold and that particular plaintiff and does not require that every party identified in this Agreement execute the Agreement.

2. PARTIES

2.0 The parties to this Agreement are

2.1 Americold Corporation and Americold Services Corporation, referred to in this Agreement as "Americold";

2.2 Tenants of Americold's Kansas City, Kansas warehouse facility (Americold Facility) and their respective subrogating property insurers, identified as "Plaintiffs" when not specifically identified. Plaintiffs include parties with lease agreements directly with Americold, parties whose property was stored in space leased to others or in areas of the warehouse which Americold did not operate as public storage space and the respective subrogating insurers of

those parties. Plaintiffs specifically include the following parties:

Arkwright Mutual Insurance Company

Commerce & Industry Insurance Company

ConAgra, Inc. and Swift-Eckrich, Inc.

Doskocil companies, Inc. and Wilson Foods Corporation

Fleming Foods, Inc.

General Accident Insurance Company of America

Hanover Insurance Company

Hartford Casualty Insurance Company

Hartford Fire Insurance Company as a representative and member of IRI

Institute of London Underwriters

Kraft Foodservice, Inc.

Phillips Confections, Inc.

QHC, Inc.

Safeway, Inc.

3. DEFINITIONS

3.0 "Americold Facility" means the Americold Warehouse Facility located at 6500 Inland Drive, Kansas City, Kansas.

3.1 "1991 Fire" means the fire that was discovered at the Americold Facility on December 28, 1991.

3.2 "Tenant Claims" means claims asserted by parties or their subrogated property insurers arising out of damage to property stored in leased areas of the Americold Facility.

3.3 "Customer Claims" means claims asserted by parties or their subrogated property insurers arising out of damage to property stored in public storage areas of the Americold Facility pursuant to Warehouse receipts or record storage agreements.

4. SUBJECT MATTER AND SCOPE OF SETTLEMENT

4.0 Plaintiffs have Tenant Claims against Americold arising out of or relating to the 1991 Fire at the Americold Facility. The Parties intend to resolve Tenant Claims against Americold as those claims are set forth in the following lawsuits:

Associated Wholesale Grocers, et al. v. Americold Corporation, et al, District Court of Wyandotte County, Kansas, Case No. 92 C 4015;

Fleming Companies, Inc., et al. v. Americold Corporation, et al. United States District Court for the District of Kansas, Case No. 92-2375, removed from the District Court of Wyandotte County, Kansas, Civil Department, Case No. 92C4040.

Food Barn Stores, Inc. v. Americold Corporation, Americold Services Corporation, Americold. Inc. and Safeway, Inc.; In The United States District

Court for the District of Kansas; Case No. 93-2024-JWL (Consolidated With 92-2188 et al) removed from the District Court of Wyandotte County, Kansas Civil Court Department; Case No. 92C05247;

Hartford Casualty Insurance Company and QHC, Inc. v. Americold Corporation et al, United States District Court for the District of Kansas, Case No. 93-2067;

Hartford Casualty Insurance Company and QHC, Inc. v. Americold Corporation, Americold Services Corporation, Americold, Inc. and Safeway. Inc.; In The United States District Court for the District of Kansas; Case no. 93-2067-JWL (Consolidated with Case Nos. 92-2118, et al.);

Kraft Foodservice, Inc., et al. v. Americold Services, et al., District Court of Wyandotte County, Kansas, Case No. 93 C 1030;

Marcus Phillips d/b/a Phillips Confections, et al. v. Americold Corporation, et al., United States District Court for the District of Kansas, Case No. 93-2540;

Real Food Marketing Company, Inc. v. Americold Corporation, Americold Services Corporation, Americold, Inc. and Safeway, Inc.; In The District Court of Wyandotte County Kansas Civil Court Department; Case No. 93C2120, Chapter 60;

Starting Right, et al. v. Americold Corporation, Americold Services Corporation, Americold, Inc. and Safeway, Inc.; In The United States District Court for the District of Kansas; Case no. 92-2458-JWL (Consolidated with Case No. 92-2118

et al) removed from The District Court of Wyandotte County Civil Court Department; Case No. 92C03570);

Swift-Eckrich, Inc., et al. v. Americold Corporation, et al., District Court of Wyandotte County, Kansas, Case No. 92 C 4033.

4.1 This Agreement does not address or resolve Customer claims made in the above cases against Americold by parties to this Agreement. In this Agreement, Plaintiffs are only settling their Tenant Claims.

4.2 Americold and Plaintiffs agree that this Agreement reflects a reasonable, good faith effort to resolve the dispute between them. Nothing in this Agreement shall be construed as an admission of liability by Americold with respect to claims asserted against it or by Plaintiffs with respect to counterclaims asserted against them by Americold.

5. REPRESENTATIONS BY AMERICOLD

5.0 Americold makes the following representations:

5.1 Substantially all of Americold's assets are held as collateral by Americold's secured creditors and Americold's indebtedness to its secured creditors exceeds the value of all Americold assets by at least $50 million.

5.2 All Americold facilities, except facilities in Portland, Maine, Burbank, California and Tampa,

Florida are encumbered and the value of the facilities at these three locations is approximately less than five percent (5%) of the total assets of Americold.

5.3 Americold does not have any policy of insurance which provides coverage for Tenant Claims other than the policies set forth in Section 7 of this Agreement.

5.4 Americold will make its employees available for deposition without subpoena or process, will provide all documents, not privileged, regarding the acquisition of the insurance identified in Section 7 of this Agreement and will provide all communications, not privileged, to and from the insurance companies identified in Section 7. Plaintiffs will pay the travel and hotel expenses, if any, in making Americold's employees available.

5.5 There are no facts giving rise to defenses to coverage arising from the acts or omissions of Americold in contracting for insurance or otherwise other than as alleged in the letters of counsel for Northwestern Pacific Indemnity Company to Americold on February 16, 1994 and April 11, 1994, and letters from TIG Insurance Company or as alleged in the declaratory judgment action filed by Northwestern Pacific Indemnity Company against Americold and others on March 15, 1994, and amended on April 11, 1994, and such information as obtained by Plaintiffs in due diligence investigation.

6. SETTLEMENT DEMAND

6.0 As a group, Plaintiffs' total claims against Americold are approximately $67 million. Plaintiffs assert that their provable damages at trial would be approximately $67 million.

6.1 Americold has shown to Plaintiffs that its 1991 general liability coverage, available to respond to the claims of tenants and their subrogating property insurers, has aggregate limits of $41 million. Americold represents to Plaintiffs that it has a negative net worth and that Americold is now an operating corporation, capable of servicing its debt load, but a judgment not covered by insurance or in excess of its insurance limits would make it unable to service its debt, trigger default provisions in the debt instruments on its secured assets, and jeopardize the viability of the company.

6.2 Plaintiffs assert that the merits of their case against Americold and the measure of their provable damages would result in a judgment far in excess of $41 million. Given Americold's financial condition, Plaintiffs submitted a demand to Americold to settle all claims of Americold's tenants and their respective subrogating property insurers for $40,750,000.00. Americold represents and agrees that this demand was within its 1991 insurance policy limits and was a reasonable demand given the merits of the case, Americold's review and evaluation of damages being sought, the risks faced by Americold at trial and the potential jeopardy to Americold's viability from a

judgment exceeding insurance limits, as more extensively described in Paragraph 6.1.

6.3 Americold represents that it demanded, on a timely basis, that its 1991 insurance carriers settle Plaintiffs' claims within the carriers' policy limits, but Americold's excess carriers, Northwestern Pacific Indemnity Company and TransAmerica Insurance Company, refused to settle Plaintiffs' claims against Americold or to defend Americold except under a reservation of rights.

7. AMERICOLD'S LIABILITY INSURANCE POLICIES

7.0 For the period January 1, 1991, through December 31, 1991, Americold represents that the following insurers provided comprehensive general liability insurance coverage to Americold:

Company	Policy No.	Policy Limit
National Union Fire Insurance Company	GL249-89-87	$1 million
Northwestern Pacific Indemnity	(92) 7907-09-49	$25 million
TransAmerica Insurance Company	XLX1213680	$15 million

7.1 For the period January 1, 1992, to January 1, 1993, Americold represents that the following companies provided general liability insurance coverage to Americold:

Company	Policy No.	Policy Limit
National Union Fire Insurance Company	RMGL249-99-14	$2 million
New Hampshire Insurance Company	32006171	$23 million
TransAmerica Insurance Company	XLX2757963	$16 million

8. ASSIGNMENT OF AMERICOLD'S CLAIMS AGAINST ITS LIABILITY INSURERS

8.0 In order to settle Plaintiffs' Tenant Claims against Americold, despite the failure of Americold's excess carriers, Northwestern Pacific Indemnity and TransAmerica Insurance Company, to defend or settle Plaintiffs' claims within their policy limits, Americold hereby assigns to Plaintiffs all of its claims against Northwestern Pacific Indemnity Insurance Company and TransAmerica Insurance Company under its respective policies with those companies, including its claims for bad faith refusal to defend or to settle claims within policy limits and for statutory damages under Kansas law awarding attorneys' fees for failure to pay without just cause or excuse.

8.1 Americold hereby also assigns to Plaintiffs all rights and claims under its 1992 policies with National Union Fire Insurance Company, New Hampshire Insurance Company, and TransAmerica for claims based on occurrences, if any, which occurred after January 1, 1992. Americold represents and has maintained throughout this litigation that

the 1991 fire was the only occurrence and does not concede or admit by this assignment that there were any occurrences after January 1, 1992.

9. ASSIGNMENT OF OTHER CLAIMS

9.0 As part of this Settlement Agreement, Americold hereby assigns to Plaintiffs all its claims arising out of or relating to Americold's purchase of insurance, against all insurance brokers, agents, and/or producers, hereinafter collectively referred to as brokers, specifically including, but not limited to claims against Oland International and Rollins Hudig Hall of Oregon, Inc., with respect to procuring insurance coverage in 1991 and 1992. Plaintiffs agree that they will not file a lawsuit against Americold's brokers based on this assignment before or until any of the following three events take place:

(1) Either of the 1991 excess carriers, Northwestern Pacific and TransAmerica assert that an act or omission of the broker prevented Americold from having excess liability coverage in 1991 for damages caused by the December 28, 1991, fire; or

(2) Either of the excess carriers, Northwestern Pacific and TransAmerica obtain a court ruling that their policies do not provide coverage for the December 28, 1991, fire; or

(3) Claims against brokers are governed by a statute of limitations that will expire within thirty (30) days.

9.1 Americold hereby assigns to Plaintiffs all breach of contract claims it may have against Return, Inc. Plaintiffs agree that they will only file a lawsuit or assert crossclaims against Return, Inc. based on this assigned claim in responding to allegations made by Americold's 1991 excess liability carriers that Return, Inc. was responsible for providing any amount or layer of liability coverage for Americold in 1991.

10. OWNERSHIP OF ASSIGNED CLAIMS

10.0 Americold makes all assignments herein to the Plaintiffs both jointly and individually to the extent of their respective Tenant Claims against Americold. With these assignments, Plaintiffs may, jointly or individually, pursue and resolve the assigned claims.

11. SETTLEMENT AMOUNT

11.0 Plaintiffs and Americold agree as follows:

11.1 Based on the merits of the claims and defenses and the measure of damages in this matter, it is fair and reasonable to assume that had this matter proceeded to trial, Plaintiffs could obtain judgments in excess of $41 million;

11.2 Although Americold is a viable company, which, at present, is capable of servicing its debt, a judgment in excess of liability insurance would trigger default provisions in debt instruments secured by

Americold's assets, and threaten the viability of the company.

11.3 As additional consideration for Americold's agreement to settle and in recognition of Americold's interest in protecting its personal assets Plaintiffs agree that they will seek to satisfy their judgments against Americold by execution, garnishment or otherwise as provided by law against the liability insurers identified in this Agreement. Plaintiffs covenant not to execute on other Americold assets, with the specific exception that Plaintiffs may pursue claims assigned to them by Americold in Sections 8 and 9 of this Agreement.

11.4 To protect itself from the risks of trial, including a judgment exceeding its policy limits, Americold agrees to settle the Tenant Claims for a total amount $58,754,574.00. Americold and Plaintiffs agree that this amount is a fair and reasonable compromise reflecting the merits of claims and defenses in the case, the evaluation of damages, the risks of trial and probability of collection.

12. ENTRY OF JUDGMENT

12.0 Americold agrees that Plaintiffs may present this settlement Agreement in the courts in which their lawsuits are pending and obtain final judgments against Americold for their separate Tenant Claims with the total amount of the judgments not exceeding $58,754,574.00.

12.1 Plaintiffs and Americold agree that Plaintiffs will obtain the following separate final judgments as part of this settlement:

Name of Party	Amount of Judgment	Court
Arkwright Mutual Insurance Company	$20,466,087.00	Wyandotte County
ConAgra, Inc. and Swift-Eckrich, Inc.	$ 7,386,142.00	Wyandotte County
Hartford Casualty Insurance Company and QHC, as their interests appear	$ 83,820.00	U.S. District
Hartford Fire Insurance Insurance Company for IRI; Doskocil Companies, Inc. and Wilson Foods Corporation as their interests appear	$ 6,421,104.00	Wyandotte County
Kraft Foodservice, Inc.	$ 4,930,373.00	Wyandotte County
Safeway, Inc. and General Accident Insurance Company of America as their interests appear	$5,283,027.00	Wyandotte County

Fleming Cos., Inc., Commerce & Industry Insurance Company and Institute of London Underwriters as their interests appear	$14,037,145.00	U.S. District
Marcus Phillips d/b/a Phillips Confections, and Hanover Insurance Company	$ 146,876.00	U.S. District

12.2 Plaintiffs agree that all such judgments shall be deemed simultaneously entered and registered regardless of the actual date and time of entry or registration and no plaintiff will assert any claims of priority or a preferential position against Americold's insurers based upon the timing of entry or registration of such judgments.

12.3 Americold and Plaintiffs agree that each judgment identified in Paragraph 12.1 may be entered pursuant to Federal Rule of Civil Procedure 54(b) or Kansas Rule of Civil Procedure § 60-254(b) after Americold and the party seeking the judgment have signed this Agreement, that there is no just reason for delay and that the Court may expressly direct that judgment be entered on that party's claims.

13. DISMISSAL OF COUNTERCLAIMS

13.0 Americold agrees that it will dismiss, with prejudice, all counterclaims asserted against the

Plaintiffs either in Wyandotte County or U.S. District Court, with the exception of its existing counterclaim against Kraft Foodservice, Inc.

13.1 Further, Americold releases all Plaintiffs from all claims arising out of, relating to or resulting from the 1991 fire, or the Americold Facility, including alleged or actual breaches of plaintiff's lease obligations to obtain liability and property insurance for the benefit or protection of Americold.

14. SETTLEMENT DOCUMENTATION/ IMPLEMENTATION

14.0 The parties agree that this document reflects their entire settlement agreement and that this document may be executed or signed in counterparts.

14.1 Americold agrees that it will make available to Plaintiffs all evidence, not privileged, that relates to Plaintiffs' pursuit of claims assigned in Sections 8 and 9 of this Agreement and will cooperate with Plaintiffs. Americold will execute any additional documents necessary to effectuate the purpose and intent of this Agreement or to pursue the assigned claims or execute on the judgments obtained by Plaintiffs.

14.2 Plaintiffs understand and agree that this Agreement reflects the agreement of each individual Plaintiff with Americold and does not, unless specifically stated, set forth an agreement between or among the Plaintiffs.

14.3 Each party to this Agreement agrees that the person signing the Agreement for that party is fully authorized to sign this Agreement and bind the party to the terms of this Agreement.

RELEASE OF LIEN AND ATTORNEYS REPRESENTATION

I, Paul H. Niewald, of and for Niewald, Waldeck & Brown, attorney for Americold Corporation and Americold Services corporation, have approved this Compromise Agreement and Release and acknowledge that attorney's fees other than those recited in this Agreement and lien therefor, are hereby waived. I have explained to our clients all of the terms of this Agreement and they have represented to us that they fully understand all of the terms thereof and their significance. Our clients have signed this Compromise Agreement and Release of their own free will and upon our advice.

I represent and agree that the amounts of the judgments described in this Agreement are fair and reasonable settlement amounts that fairly and reasonably reflect the merits of the claims and defenses in the case, the evaluation of damages, and the risks of trial.

I represent and agree that the terms of this Agreement are a fair and reasonable compromise of the dispute between the Plaintiffs and Americold and that this Agreement was entered into in good faith by Americold.

Dated this 22nd day of June, 1994.

/s/ Paul H. Niewald
Paul H. Niewald of and for
Niewald, Waldeck & Brown

Dated this 15th day of June, 1994.

AMERICOLD CORPORATION

By /s/ F. Stanley Seva

Its Senior Vice President

Subscribed and sworn to before
me this 15th day of June, 1994.

/s/ Mary Lou Starker [NOTARY SEAL]
Notary Public – State of Oregon

Dated this 15th day of June, 1994.

AMERICOLD SERVICES
CORPORATION

By /s/ F. Stanley Seva

Its Senior Vice President

Subscribed and sworn to before
me this 15th day of June, 1994.

/s/ Mary Lou Starker [NOTARY SEAL]
Notary Public – State of Oregon

Dated this 15th day of June, 1994.

ARKWRIGHT MUTUAL
INSURANCE COMPANY

By /s/ [Illegible]

Its ATTORNEY-IN-FACT

Subscribed and sworn to before
me this 15th day of June, 1994.

/s/ [Illegible]
Notary Public
Alan G. Trebut
My Commission Expires 10/17/97

Dated this 24th day of July, 1994.

COMMERCE & INDUSTRY
INSURANCE COMPANY

By /s/ Walter L. Mooney

Its President

Subscribed and sworn to before
me this 2th day of July, 1994.

/s/ Deirdre A. Higgins
Notary Public

[NOTARY SEAL]

Dated this 25th day of July, 1994.

CONAGRA, INC.

By /s/ C. Wayne Gano Jr.

Its Vice President Insurance & Loss Control

Subscribed and sworn to before me this 25th day of July, 1994.

/s/ Judith A. Poorazk [NOTARY SEAL]
Notary Public

Dated this 26th day of July, 1994.

SWIFT-ECKRICH, INC.

By /s/ [Illegible]

Its Senior Vice President & CEO

Subscribed and sworn to before me this 26th day of July, 1994.

/s/ Susan Kravchuk
Notary Public

[NOTARY SEAL]

Dated this 15th day of June, 1994.

DOSKOCIL COMPANIES, INC.

By /s/ [Illegible]

Its Vice President

Subscribed and sworn to before
me this 15th day of June, 1994.

/s/ Leah J. Martin
Notary Public [NOTARY SEAL]

Dated this 15th day of June, 1994.

WILSON FOODS CORPORATION

By /s/ [Illegible]

Its Vice President

Subscribed and sworn to before
me this 15th day of June, 1994.

/s/ Leah J. Martin
Notary Public [NOTARY SEAL]

Dated this 19th day of July, 1994.

FLEMING FOODS, INC.
[Fleming Corporation, Inc.]

By /s/ George M. Ward

Its Claim/Litigation Manager

Subscribed and sworn to before
me this 19th day of July, 1994.

/s/ Carol A. Ford
Notary Public

Dated this 27th day of June, 1994.

GENERAL ACCIDENT
INSURANCE COMPANY
OF AMERICA

By /s/ [Illegible]

Its Recovery Manager

Subscribed and sworn to before
me this 28 day of June, 1994.

/s/ Patricia K. Cole
Notary Public

[NOTARY SEAL]

Dated this 19th day of July, 1994.

HANOVER INSURANCE COMPANY

By /s/ [Illegible]

Its Claim Manager

Subscribed and sworn to before
me this 19th day of July, 1994.

/s/ Elizabeth P. Shirley
Notary Public [NOTARY SEAL]

Dated this 19th day of July, 1994.

HARTFORD CASUALTY
INSURANCE COMPANY

By /s/ Janise L. Johnson

Its Claim Representative

Subscribed and sworn to before
me this 19th day of July, 1994.

/s/ Dianne Jacobs
Notary Public [NOTARY SEAL]

Dated this 14 day of June, 1994.

HARTFORD FIRE INSURANCE
COMPANY AS A REPRESENTATIVE
AND MEMBER OF IRI

By /s/ [Illegible]

Its ATTORNEY-IN-FACT

Subscribed and sworn to before
me this 14th day of June, 1994.

/s/ [Illegible]
Notary Public

INSURANCE COMPANIES,
MEMBERS OF INSTITUTE OF
LONDON UNDERWRITERS

Subscribing to Policy Number: 4H1
By: /s/ [Illegible]

Title: CLAIMS ADJUSTER

LONDON
ENGLAND

Before me this day appeared, Alan Cairns who after first being duly sworn, confirmed that he is the Claims Adjuster, AXA Marine & Aviation Insurance (UK) Limited Member Company of Institute of London

Underwriters and that he is duly authorised to enter into this Release and Settlement Agreement.

Subscribed and sworn to before me, this 21st day of July, 1994

/s/ John Fisher
John Fisher
Solicitor of the Supreme Court of England and Wales, Partner of Clyde & Co.

My Commission Expires:

_____

CLYDE & CO.
51 EASTCHEAP
LONDON EC3M 1JP

Dated this 20th day of June, 1994.

KRAFT FOODSERVICE, INC.

By /s/ David E. Hieber

Its Senior Manager Insurance & Claims Administrator

Subscribed and sworn to before me this 20th day of June, 1994.

/s/ Loretta D. Gatewood
Notary Public

[NOTARY SEAL]

Dated this 27 day of July, 1994.

MARCUS PHILLIPS
d/b/a PHILLIPS CONFECTIONS

By /s/ Marcus D. Phillips

Its Managing Partner

Subscribed and sworn to before
me this 27th day of July, 1994.

/s/ Michelle J. O'Leary
Notary Public

[NOTARY SEAL]

Dated this 19th day of July, 1994.

QHC, INC.

By /s/ [Illegible]

Its V.P.

[NOTARY SEAL]

Subscribed and sworn to before
me this 19th day of July, 1994.

/s/ Colleen A. Harris
Notary Public

Dated this 15th day of July, 1994.

SAFEWAY, INC.

By /s/ [Illegible]

Its Vice President

Subscribed and sworn to before
me this 15th day of July, 1994.

/s/ G. Gonzales
Notary Public [NOTARY SEAL]

EXHIBIT 2

CERTIFICATE

State of Oregon

OFFICE OF THE SECRETARY OF STATE
Corporation Division

I, BILL BRADBURY, Secretary of State of Oregon, and Custodian of the Seal of said State, do hereby certify:

That the attached copy of the
Articles of
Merger
filed on
December 27, 2002
with a stated effective date of ***January 1, 2003***
for
AMERICOLD CORPORATION
merging with and into
AMERICOLD CORPORATION OF MARYLAND INC
is a true copy of the original document that has been filed with this office.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Oregon.

[SEAL] *BILL BRADBURY, Secretary of State*

By /s/ Debra L. Virag
Debra L. Virag
September 13, 2006

[SEAL] Phone: (503) 986-2200
Fax: (503) 378-4381

[Illegible]
Articles of Merger

Secretary of State
Corporation Division
255 Capitol St. NE,
Suite 151
Salem, OR 97310-1327
FilinginOregon.com

Check the appropriate box below:

☒ MULTI ENTITY MERGER
(Complete only 1, 2, 3, 4, 10, 11)

☐ FOR PARENT AND 90% OWNED SUBSIDIARY WITHOUT SHAREHOLDER APPROVAL
(Complete only 5, 6, 7, 8, 9, 10, 11)

SURVIVOR
REGISTRY NUMBER: 034685-19

(Filed Dec. 27, 2002)

In keeping with Oregon Statute 192.410-192.595, the information on the application is public record. We must release this information to all parties upon request and it may be posted on our website.

For office use only

Please Type or Print Legibly in Black Ink. Attach Additional Sheet if Necessary.

1) NAMES AND TYPES OF THE ENTITIES PROPOSING TO MERGE

NAME	TYPE	REGISTRY NUMBER
Americold Corporation	Oregon corporation	034685-19
Americold Corporation of Maryland, Inc.	Maryland corporation	N/A

2) NAME AND TYPE OF THE SURVIVING ENTITY AMERICOLD CORPORATION OF MARYLAND, INC., A MARYLAND CORPORATION

☐ Check here if there is a name change in this plan of merger.

3) A COPY OF THE MERGER PLAN IS ATTACHED.

4) THE PLAN OF MERGER WAS DULY AUTHORIZED AND APPROVED BY EACH ENTITY THAT IS A PARTY TO THE MERGER.

☒ A copy of the vote required by each entity is attached

FOR PARENT AND 90% OWNED SUBSIDIARY WITHOUT SHAREHOLDER APPROVAL

5) NAME OF PARENT CORPORATION _____

Oregon Registry Number _____

6) NAME OF SUBSIDIARY CORPORATION _____

Oregon Registry Number _____

7) NAME OF SURVIVING CORPORATION _____

8) COPY OF PLAN

☐ A copy of the plan of merger setting forth the manner and basis of converting shares of the subsidiary into shares, obligations, or other securities of the parent corporation or any other corporation or into cash or other property is attached.

9) CHECK THE APPROPRIATE BOX

☐ A copy of the plan of merger or summary was mailed to each shareholder of record of the subsidiary corporation on or before _____
Date

☐ The mailing of a copy of the plan or summary was waived by all outstanding shares.

---

10) EXECUTION

Printed Name	Signature	Title
Jonathan C. Daiker	/s/ J.C. Daiker	Senior Vice President

---

11) CONTACT NAME (To resolve questions with this filing.)

Guanming Fang

DAYTIME PHONE NUMBER (Include area code.)

404-873-7018

FEES
Required Processing Fee $20 – Processing Fees are nonrefundable. Please make check payable to "Corporation Division." NOTE: Fees may be paid with VISA or Master Card The card number and expiration date should be submitted on a separate sheet for your protection

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PLAN AND AGREEMENT OF MERGER
OF
AMERICOLD CORPORATION
with and into
AMERICOLD CORPORATION
OF MARYLAND, INC.

I.

NAMES

The names of the entities planning to merge are AMERICOLD CORPORATION, a corporation for profit organized under the laws of the State of Oregon ("*Americold*") and AMERICOLD CORPORATION OF MARYLAND, INC., a corporation for profit organized under the laws of the State of Maryland ("*Americold-MD*").

II.

MERGER

Americold and Americold-MD shall, pursuant to the provisions of the Oregon Business Corporation

Act (the "*Oregon Act*") and the Maryland General Corporation Law (the "*MGCL*"), be merged (the "*Merger*") with and into a single corporation, to wit, Americold-MD, which shall be the surviving corporation when the merger takes effect (the "*Effective Time*") and which is sometimes hereinafter referred to as the "*Surviving Corporation*", and which shall continue to exist as the Surviving Corporation pursuant to the provisions of the MGCL. The separate existence of Americold, which is sometimes hereinafter referred to as the "*Terminating Corporation*", shall cease as of the Effective Time of the Merger in accordance with the provisions of the Oregon Act.

III.
ARTICLES OF INCORPORATION

The Articles of Incorporation of the Surviving Corporation (the "*Articles of Incorporation*") as in effect immediately before the Effective Time of the Merger shall be the Articles of Incorporation of the Surviving Corporation and shall continue to be the Articles of Incorporation of the Surviving Corporation until thereafter amended as provided by law.

IV.
BYLAWS

The Bylaws of the Surviving Corporation as in effect immediately before the Effective Time of the Merger shall be the Bylaws of the Surviving Corporation and shall continue to be the Bylaws of the Surviving Corporation until thereafter amended as

provided by law, the Articles of Incorporation of the Surviving Corporation or such Bylaws.

V.
DIRECTORS AND OFFICERS

The directors and officers of the Surviving Corporation in office immediately before the Effective Time of the Merger shall continue to be the directors and officers of the Surviving Corporation, all of whom shall hold their directorships and offices until the election and qualification of their respective successors or until their tenure is otherwise terminated by law or in accordance with the Bylaws of the Surviving Corporation.

VI.
SHARES

At the Effective Time (as defined herein), by virtue of the Merger and without any action on the part of the holder thereof, each share of common stock of Americold, par value $.01 per share ("Americold Common Stock"), issued and outstanding immediately prior to the Effective Time shall be converted into the right to receive one validly issued, fully paid and nonassessable share of common stock of Americold-MD, par value $.01 per share ("Americold-MD Common Stock"), and each share of preferred stock of Americold, par value $.01 per share ("Americold Preferred Stock"), issued and outstanding immediately prior to the Effective Time shall be

converted into the right to receive one validly issued, fully paid and nonassessable share of preferred stock of Americold-MD, par value $.01 per share ("Americold-MD Preferred Stock").

At the Effective Time, all issued and outstanding Americold Common Stock converted into the right to receive Americold-MD Common Stock pursuant to this Agreement shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate or other right representing any such Americold Common Stock shall cease to have any rights with respect thereto, except the right to receive Americold-MD Common Stock in accordance with this Agreement upon surrender of such certificate or other right.

At the Effective Time, all issued and outstanding Americold Preferred Stock converted into the right to receive Americold-MD Preferred Stock pursuant to this Agreement shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate or other right representing any such Americold Preferred Stock shall cease to have any rights with respect thereto, except the right to receive Americold-MD Preferred Stock in accordance with this Agreement upon surrender of such certificate or other right.

The Americold-MD Common Stock issued and outstanding immediately prior to the Effective Time shall automatically be cancelled and retired and shall

cease to exist, and no consideration shall be delivered or deliverable in exchange therefor.

[SEAL] Phone: (503) 986-2200
Fax: (503) 378-4381

Articles/Certificate of Correction – All Entities

Secretary of State
Corporation Division
255 Capitol St. NE,
Suite 151
Salem, OR 97310-1327
FilinginOregon.com

(Filed Dec. 30, 2002)

REGISTRY NUMBER: 034685-19

In keeping with Oregon Statute 192.410-192.595, the information on the application is public record. We must release this information to all parties upon request and it may be posted on our website. For office use only

Please Type or Print Legibly in Black Ink. Attach Additional Sheet if Necessary.

1) NAME of Entity Americold Corporation

NOTE: The Change of Registered Agent or Office form must be used to change the registered agent.

---

2) DOCUMENT DESCRIPTION (Describe the document to be corrected, including the date on which it was filed, or attach a copy of the document to be corrected.)

Articles of Merger and Plan and Agreement of Merger, filed on 12/27/02 (see attached)

3) INCORRECT STATEMENT (Describe the incorrect statement and indicate the reason it is incorrect.)

The Plan and Agreement of Merger states that the Merger shall take effect as of 12:01 a.m. January 1, 2003. The effective time of the merger should have been 11:58 p.m. December 31, 2003.

4) CORRECTION (The incorrect statement is corrected to read as follows. Attach additional sheets if necessary.)

The Merger shall take effect as of 11:58 p.m. on December 31, 2002 (the "Effective Time") (see attached Amendment to Plan and Agreement of Merger)

5) EXECUTION

Printed Name	Signature
Jonathan C. Daiker	/s/ J.C. Daiker
Title	Date
Senior V.P and CFO	12/30/02

6) CONTACT NAME (To resolve questions with this filing.)

Guanming Fang

DAYTIME PHONE NUMBER (Include area code.)

404-873-7018

FEES
Required Processing Fee $20 – Processing Fees are nonrefundable. Please make check payable to "Corporation Division." NOTE: Fees may be paid with VISA or Master Card The card number and expiration date should be submitted on a separate sheet for your protection

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AMENDMENT TO PLAN OF MERGER

This AMENDMENT TO PLAN OF MERGER (the "*Amendment*"), is entered into this 30th day of December, 2002, by and between AMERICOLD CORPORATION, a corporation for profit organized under the laws of the State of Oregon ("*Americold*") and AMERICOLD CORPORATION OF MARYLAND, INC., a corporation for profit organized under the laws of the State of Maryland ("Americold-MD").

WITNESSETH:

WHEREAS, the parties have entered into that certain Plan and Agreement of Merger dated December

24, 2002 (the "*Plan*"), which Plan was filed with the Secretary of State of the State of Oregon on December 27, 2002, together with the Articles of Merger between the parties; and

WHEREAS, the parties desire [sic] amend the Plan as provided herein.

NOW, THEREFORE, for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Section VII of the Plan shall be deleted in its entirety and shall be replaced with the following:

"VII.
EFFECTIVE TIME OF MERGER

The Merger shall take effect as of 11:58 p.m. on December 31, 2002 (the "Effective Time")."

2. Except as specifically amended as set forth herein, the terms, conditions, and provisions of the Plan shall remain unaltered and in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed as of the date first above set forth.

AMERICOLD CORPORATION,
an Oregon corporation

By: /s/ J.C. Daiker
Jonathan C. Daiker,
Senior Vice President
and CFO

AMERICOLD CORPORATION OF MARYLAND, INC., a Maryland corporation

By: /s/ J.C. Daiker
Jonathan C. Daiker,
Senior Vice President
and CFO

CUST ID: 0001029364
WORK ORDER: 0000582022
DATE: 12-31-2002 12:02 PM
AMT. PAID: $101.00

EXHIBIT 3

STATE OF MARYLAND

I hereby certify that this is a true and complete copy of the 5 page document on file in this office. DATED: 9-19-06.

STATE DEPARTMENT OF
ASSESSMENTS AND TAXATION

BY: /s/ Alexander [Illegible], custodian

This stamp replaces our previous certification system. Effective: 6/95

ARTICLES OF MERGER

Merging
AMERICOLD CORPORATION,
a Corporation of the State of Oregon

Into
AMERICOLD CORPORATION OF MARYLAND, INC.,
a Corporation of the State of Maryland

FIRST: Americold Corporation, a corporation organized and existing under the laws of the State of Oregon ("*Americold*"), and Americold Corporation of Maryland, Inc., a corporation organized and existing under the laws of the State of Maryland ("*Americold-MD*"), agree that Americold shall be merged (the "Merger") into Americold-MD. The terms and conditions of the Merger and the mode carrying the same into effect are as herein set forth in these Articles of Merger.

SECOND: Americold-MD shall survive the Merger and shall continue under the name "Americold Corporation of Maryland, Inc." Americold-MD is formed under the laws of the State of Maryland.

THIRD: The parties to the Articles of Merger are Americold and Americold-MD. Americold was incorporated on the 13th day of February, 1931 under the general laws of the Oregon Business Corporation Act (the "*Oregon Act*"), which corporation is not registered or qualified to do business in the State of Maryland.

FOURTH: The total number of shares of stock of all classes which Americold has authority to issue is One Thousand Seven Hundred (1,700) shares divided into One Thousand (1,000) shares of common stock, par value $.01 per share ("Americold Common Stock"), and Seven Hundred (700) shares of preferred

stock, par value $.01 per share ("Americold Preferred Stock"). The aggregate par value of all shares of all classes of stock with par value of Americold is $17.00.

The total number of shares of stock of all classes which Americold-MD has authority to issue is One Thousand Seven Hundred (1,700) shares divided into One Thousand (1,000) shares of common stock, par value $.01 per share ("Americold-MD Common Stock"), and Seven Hundred (700) shares of preferred stock, par value $.01 per share ("Americold-MD Preferred Stock"). The aggregate par value of all shares of all classes of stock with par value of Americold-MD is $17.00.

FIFTH: Upon the Effective Time (as defined herein), Americold shall be merged into Americold-MD. Thereupon, Americold-MD shall possess any and all purposes and powers of Americold; and all leases, licenses, property, rights, privileges, and powers of whatever nature and description of Americold shall be transferred to, vested in, and devolved upon Americold-MD, without further act or deed, subject to all of the debts, liabilities and obligations of Americold.

SIXTH: At the Effective Time, by virtue of the Merger and without any action on the part of the holder thereof, each share of Americold Common Stock issued and outstanding immediately prior to the Effective Time shall be converted into the right to receive one validly issued, fully paid and nonassessable share of Americold-MD Common Stock, and each share of Americold Preferred Stock issued and outstanding

immediately prior to the Effective Time shall be converted into the right to receive one validly issued, fully paid and nonassessable share of Americold-MD Preferred Stock.

At the Effective Time, all issued and outstanding Americold Common Stock converted into the right to receive Americold-MD Common Stock pursuant to this Article shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate or other right representing any such Americold Common Stock shall cease to have any rights with respect thereto, except the right to receive Americold-MD Common Stock in accordance with this Article upon surrender of such certificate or other right.

At the Effective Time, all issued and outstanding Americold Preferred Stock converted into the right to receive Americold-MD Preferred Stock pursuant to this Article shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate or other right representing any such Americold Preferred Stock shall cease to have any rights with respect thereto, except the right to receive Americold-MD Preferred Stock in accordance with this Article upon surrender of such certificate or other right.

The Americold-MD Common Stock issued and outstanding immediately prior to the Effective Time shall automatically be cancelled and retired and shall cease to exist, and no consideration shall be delivered

or deliverable in exchange therefor. There are no shares of Americold-MD Preferred Stock issued and outstanding immediately prior to the Effective Time.

SEVENTH: The principal office of Americold-MD is located at 300 East Lombard Street, City of Baltimore, State of Maryland. Americold does not have a principal office in the State of Maryland. Neither Americold, nor Americold-MD, has any interest in land in the State of Maryland.

EIGHTH: The terms and conditions of the transaction described in these Articles of Merger were duly advised, authorized and approved by Americold-MD in the manner and by the vote required by its charter and the laws of the State of Maryland, as follows: A Plan and Agreement of Merger, setting forth the terms and conditions of the Merger was (a) duly advised by the board of directors of Americold-MD by the adoption, on December 24, 2002, of a written consent, declaring that the Merger herein proposed was advisable substantially upon the terms and conditions set forth in these Articles of Merger and directing that the proposed Articles of Merger be submitted for action thereon by the stockholders of Americold-MD, and (b) duly approved by the stockholders of Americold-MD by unanimous written consent of all shares entitled to vote on the matter.

NINTH: The terms and conditions of the transaction described in these Articles of Merger were duly advised, authorized and approved by Americold in the manner and by the vote required by its charter and

the laws of the State of Oregon, as follows: A Plan and Agreement of Merger, setting forth the terms and conditions of the Merger was (a) duly advised by the board of directors of Americold by the adoption, on December 24, 2002, of a written consent, declaring that the Merger herein proposed was advisable substantially upon the terms and conditions set forth in these Articles of Merger and directing that the proposed Articles of Merger be submitted for action thereon by the shareholders of Americold, and (b) duly approved by the shareholders of Americold by unanimous written consent of all shares entitled to vote on the matter.

TENTH: The Merger shall become effective as of 11:58 p.m. on December 31, 2002 (the "Effective Time").

ELEVENTH: Each undersigned President or Vice President, as the case may be, acknowledges these Articles of Merger to be the act of the respective entity on whose behalf he has signed, and further, as to all matters or facts required to be verified under oath, each undersigned President or Vice President acknowledges that to the best of his knowledge, information and belief, these matters and facts relating to the entity on whose behalf he has signed are true in all material respects and that this statement is made under the penalties for perjury.

[Signatures on the following page]

IN WITNESS WHEREOF, Americold and Americold-MD, the corporations parties to the Merger, have

caused these Articles of Merger to be signed in their respective corporate names and on their behalf by their respective presidents or vice-presidents and witnessed or attested by their respective secretaries or assistant secretaries all as of the 24th day of December, 2002.

AMERICOLD CORPORATION,
an Oregon corporation

By: /s/ J. C. Daiker
Name: Jonathan C. Daiker
Its: Senior Vice President

Attest: (Witness:)

/s/ Tony Worland
Secretary

AMERICOLD CORPORATION OF MARYLAND, INC.,
a Maryland corporation

By: /s/ J. C. Daiker
Name: Jonathan C. Daiker
Its: Senior Vice President

Attest: (Witness:)

/s/ Tony Worland
Secretary

CORPORATE CHARTER APPROVAL SHEET
**** EXPEDITED SERVICE ****
**** KEEP WITH DOCUMENT ****

DOCUMENT CODE 11

BUSINESS CODE ___

_____

Close _____ Stock _____

Nonstock ____ P.A. ____

Religious ____

Merging (~~Transferor~~)
Americold Corporation
_____
_____
_____

Surviving (~~Transferee~~)
Americold Corporation
of Maryland, Inc.
D07101629

[BAR CODE]
1000351987843889

ID # D07101629
ACK # 1000361987843889
LIBER: B00462
FOLIO: 0974
PAGES: 0005
AMERICOLD
CORPORATION OF
MARYLAND, INC.
12/31/2002 AT 11:02 A
WO # 0000682022

New Name _____

FEES REMITTED

Base Fee:	20
Org. & Cap. Fee:	
Expedite Fee:	70
Penalty:	
State Recordation Tax:	
State Transfer Tax:	
1 Certified Copies Copy Fee:	11
____ Certificates Certificate of Status Fee:	

Personal Property Filings: _____
Other: _____
TOTAL FEES: 101

_____ Change of Name
_____ Change of Principal Office
_____ Change of Resident Agent
_____ Change of Resident Agent Address
_____ Resignation of Resident Agent
_____ Designation of Resident Agent and Resident Agent's Address
_____ Change of Business Code

_____

_____ Adoption of Assumed Name

_____

_____

_____ Other Change(s)

_____

_____

Code 193

Credit Card ___ Check ___ Attention: ABL

Cash ___

___ Documents on __ Checks Mail to Address:

Approved By: 9 _____

Keyed By: _____ _____

COMMENTS:

[File 3rd Note effective time]

CUST ID:0001029364
WORK ORDER: 0000682022
DATE: 12-31-2002 12:02 PM
AMT. PAID: $101.00

Stamp Work Order and
Customer Number HERE

EXHIBIT 4

STATE OF MARYLAND

I hereby certify that this is a true and complete copy of the 5 page document on file in this office.
DATED: 9-19-06.

STATE DEPARTMENT OF
ASSESSMENTS AND TAXATION

BY: /s/ Alexander [Illegible], custodian

This stamp replaces our previous certification system. Effective: 6/95

ARTICLES OF MERGER

Merging
AMERICOLD CORPORATION OF MARYLAND, INC.,
a Corporation of the State of Maryland

Into
AMERICOLD REALTY TRUST,
a Real Estate Investment Trust of the
State of Maryland

Pursuant to Sections 3-102, 3-107, 3-109, and 8-501.1 of the Maryland Corporations and Associations Article of the Annotated Code of Maryland, the undersigned submit the following for filing:

1. Americold Corporation of Maryland, Inc., a Maryland corporation (*"Americold"*), and Americold Realty Trust, a Maryland real estate investment trust (the *"Trust"*), hereby agree to merge (the *"Merger"*) as set forth in these Articles of Merger.

2. The name and place of incorporation or organization of each corporation and real estate investment trust party to the Merger are as follows:

Name	Place of Organization
Americold Corporation of Maryland, Inc.	Maryland
Americold Realty Trust	Maryland

3. The entity surviving the Merger is Americold Realty Trust, a real estate investment trust organized under, and governed by, the laws of the State of Maryland.

4. The county in Maryland where Americold or the Trust has its principal office is as follows:

Name	County
Americold Corporation of Maryland, Inc.	City of Baltimore
Americold Realty Trust	City of Baltimore

5. Neither Americold, nor the Trust, owns any interest in land in the State of Maryland.

6. The terms and conditions of the transaction described in these Articles of Merger were duly advised, authorized and approved by Americold in the manner and by the vote required by its charter and the laws of the State of Maryland, as follows: An Agreement and Plan of Merger setting forth the terms and conditions for the Merger provided herein was (a) duly advised by the Board of Directors of Americold by unanimous written consent, declaring that the Merger herein proposed was advisable substantially upon the terms and conditions set forth in these Articles of Merger and directing that the proposed Articles of Merger be submitted for action thereon by the sole stockholder of Americold, and (ii) duly approved by the sole stockholder holding all of the voting stock of Americold by written consent.

7. The terms and conditions of the transaction described in these Articles of Merger were duly advised, authorized and approved by the Trust in the manner and by the vote required by its declaration of trust and the laws of the State of Maryland, as follows: An Agreement and Plan of Merger setting forth the terms and conditions for the Merger provided herein was (a) duly advised by the Board of Trustees

of the Trust by unanimous written consent, declaring that the Merger herein proposed was advisable substantially upon the terms and conditions set forth in these Articles of Merger and directing that the proposed Articles of Merger be submitted for action thereon by the sole shareholder of the Trust, and (b) duly approved by the sole shareholder of the Trust by written consent.

8. The Declaration of Trust of the Trust as in effect immediately before the effective time of the Merger shall be the Declaration of Trust of the Trust after the effective time of the Merger and shall continue to be the Declaration of Trust of the Trust until thereafter amended as provided by law.

9. The total number of shares of stock of all classes which Americold has authority to issue is One Thousand Seven Hundred (1,700) shares, divided into (i) One Thousand (1,000) shares of common stock, par value $.01 per share ("Americold Common Stock"), and (ii) Seven Hundred (700) shares of preferred stock, par value $.01 per share ("Americold Preferred Stock"). The aggregate par value of all classes of all shares of stock with par value of Americold is $17.00.

The total number of shares of beneficial interest of all classes which the Trust has authority to issue is One Thousand Seven Hundred (1,700) shares, divided into (i) One Thousand (1,000) common shares of beneficial interest, par value $.01 per share ("Trust Common Shares"), with an aggregate par value of Ten Dollars ($10.00); and (ii) Seven Hundred (700)

preferred shares of beneficial interest, par value $.01 per share ("Trust Preferred Shares"), with an aggregate par value of Seven Dollars ($7.00).

10. Upon the Effective Time (as defined herein), Americold shall be merged into the Trust. Thereupon, the Trust shall possess any and all purposes and powers of Americold; and all leases, licenses, property, rights, privileges, and powers of whatever nature and description of Americold shall be transferred to, vested in, and devolved upon the Trust, without further act or deed, subject to all of the debts, liabilities and obligations of Americold.

11. The Merger shall become effective at 11:59 p.m. on December 31, 2002 (the "Effective Time").

12. At the Effective Time, by virtue of the Merger and without any action on the part of the holder thereof, each share of Americold Common Stock issued and outstanding immediately prior to the Effective Time shall be converted into the right to receive one validly issued, fully paid and nonassessable Trust Common Share, and each share of Americold Preferred Stock issued and outstanding immediately prior to the Effective Time shall be converted into the right to receive one validly issued, fully paid and nonassessable Trust Preferred Share.

At the Effective Time, all issued and outstanding Americold Common Stock converted into the right to receive Trust Common Shares pursuant to this Article shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist,

and each holder of a certificate or other right representing any such Americold Common Stock shall cease to have any rights with respect thereto, except the right to receive Trust Common Shares in accordance with this Article upon surrender of such certificate or other right.

At the Effective Time, all issued and outstanding Americold Preferred Stock converted into the right to receive Trust Preferred Shares pursuant to this Article shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each holder of a certificate or other right representing any such Americold Preferred Stock shall cease to have any rights with respect thereto, except the right to receive Trust Preferred Shares in accordance with this Article upon surrender of such certificate or other right.

The Trust Common Shares issued and outstanding immediately prior to the Effective Time shall automatically be cancelled and retired and shall cease to exist, and no consideration shall be delivered or deliverable in exchange therefor. There are no Trust Preferred Shares issued and outstanding immediately prior to the Effective Time.

13. Each undersigned President or Vice President, as the case may be, acknowledges these Articles of Merger to be the act of the respective entity on whose behalf he has signed, and further, as to all matters or facts required to be verified under oath, each undersigned President or Vice President acknowledges that to the best of his knowledge, information and belief,

these matters and facts relating to the entity on whose behalf he has signed are true in all material respects and that this statement is made under the penalties for perjury,

[Signatures on following page]

IN WITNESS WHEREOF, Americold Corporation of Maryland, Inc. and Americold Realty Trust, the parties to the Merger, have caused these Articles of Merger to be signed in their respective name and on their behalf by their respective authorized officer and witnessed or attested by their respective authorized officer, as of the 27th day of December, 2002.

AMERICOLD CORPORATION OF MARYLAND, INC.,
a Maryland corporation

By: /s/ J. C. Daiker
Name: Jonathan C. Daiker
Its: Senior Vice President

Attest: (Witness:)

/s/ Tony Worland
Secretary

AMERICOLD REALTY TRUST,
a Maryland real estate investment trust

By: /s/ J. C. Daiker
Name: Jonathan C. Daiker
Its: Senior Vice President

Attest: (Witness:)

/s/ Tony Worland
Secretary

CORPORATE CHARTER APPROVAL SHEET
**** EXPEDITED SERVICE ****
**** KEEP WITH DOCUMENT ****

DOCUMENT CODE 11

BUSINESS CODE ___

_____

Close _____ Stock _____

Nonstock ____ P.A. ____

Religious ____

Merging (~~Transferor~~)
Americold Corporation
of Maryland, Inc.
D07101629

_____

Surviving (~~Transferee~~)
Americold Realty Trust
D07146913

_____

[BAR CODE]
1000351987843821

_____

ID # D07146913
ACK # 1000361987843921
LIBER: B00462
FOLIO: 0985
PAGES: 0005
AMERICOLD REALTY TRUST
12/31/2002 AT 11:03 A
WO # 0000682024

New Name _____

_____

_____

FEES REMITTED

Base Fee: 20
Org. & Cap. Fee: _____
Expedite Fee: 70

Penalty: _____
State Recordation Tax: _____
State Transfer Tax: _____
_1_ Certified Copies _____
Copy Fee: 11
____ Certificates _____
Certificate of Status Fee: _____
Personal Property Filings: _____
Other: _____
TOTAL FEES: 101

_____ Change of Name
_____ Change of Principal Office
_____ Change of Resident Agent
_____ Change of Resident Agent Address
_____ Resignation of Resident Agent
_____ Designation of Resident Agent and Resident Agent's Address
_____ Change of Business Code

_____

_____ Adoption of Assumed Name

_____

_____

_____ Other Change(s)

_____

_____

Code 193

Credit Card ___ Check ___ Attention: ABL

Cash ___

___ Documents on __ Checks Mail to Address:

Approved By: 9 _____

Keyed By: _____ _____

COMMENTS:

[File 4th Note effective time]

CUST ID:0001029368
WORK ORDER: 0000682024
DATE: 12-31-2002 12:06 PM
AMT PAID: $101.00

Stamp Work Order and
Customer Number HERE

CERTIFIED MAIL

[BAR CODE] [POSTAGE]
7010 3090 0002 6980 7211

Duggan, Shadwick, Doerr & Kurlbaum, PC
11040 Oakmont
Overland Park, Kansas 66210

Americold Logistics, LLC
c/o The Corporation Company
112 SW 7th Street, Ste. 3C
Topeka, Kansas 66603

EXHIBIT B

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
CIVIL DIVISION

CONAGRA FOODS, INC. F/K/A CONAGRA, INC. and SWIFT-ECKRICH, INC. and KRAFT FOODSERVICE, INC. and SAFEWAY, INC. and PHILLIPS CONNECTIONS, INC. D/B/A PHILLIPS CONNECTIONS AND HANOVER, INC. Plaintiffs, v. AMERICOLD LOGISTICS, LLC and AMERICOLD REALTY TRUST Defendants.	Case No. 12-CV-1428 Division 3

DEFENDANTS' NOTICE OF FILING NOTICE OF REMOVAL

PLEASE TAKE NOTICE that on February 7, 2013, Defendants filed with the United States District

Court for the District of Kansas, their Notice of Removal pursuant to 28 U.S.C. § 1441, a copy of which is attached, thereby removing this action from the District Court of Wyandotte County, Kansas, to the United States District Court for the District of Kansas.

Respectfully submitted,

EDGAR LAW FIRM LLC

/s/ Michael D. Pospisil
Michael D. Pospisil KS # 18540
John M. Edgar KS FED #70270
Edgar Law Firm LLC
1032 Pennsylvania Ave.
Kansas City, Missouri 64105
Telephone: (816) 531-0033
Facsimile: (816) 531-3322
Email: jme@edgarlawfirm.com
Email: mdp@edgarlawfirm.com
ATTORNEYS FOR DEFENDANTS

[Certificate Of Service Omitted]

NO. 13-3277

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC. F/K/A CONAGRA, INC., et al.,

Plaintiffs-Appellants,

v.

AMERICOLD LOGISTICS, LLC, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
The Honorable John W. Lungstrum District Judge
District Court Case No. 2:13-cv-02064-JWL/KGS

RESPONSE BRIEF OF APPELLANTS CONAGRA FOODS, INC. F/K/A CONAGRA, INC. and SWIFT-ECKRICH, INC.

(Filed Oct. 24, 2014)

John M. Duggan, KS# 14053
Deron A. Anliker, KS# 16877
Andrew I. Spitsnogle, KS# 25788
Duggan Shadwick Doerr & Kurlbaum LLC
11040 Oakmont Street
Overland Park, Kansas 66210
(913) 498-3536
Attorneys for Appellants

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[4] ARGUMENT

This Court's October 7, 2014, Order requested supplemental briefing addressing the following questions:

> 1. Was the Defendants' Notice of Removal sufficient to establish diversity jurisdiction in that the Notice did not establish the citizenship of the beneficial shareholders or beneficiaries of the Americold Realty Trust?
>
> 2. If the Notice of Removal did not establish diversity jurisdiction, what curative facts, if any, may the appellee aver to correct this defect in this appeal?

October 7, 2014, Order at 1-2.

Appellees' Supplemental Brief, filed on October 17, 2014, concludes that the Americold Realty Trust's

citizenship is determined by the citizenship of its trustees. Supplemental Brief of Appellees Americold Logistics, LLC and Americold Realty Trust ("Appellees' Supplemental Brief") at 1-6. Appellee asserts that any deficiency in the Notice of Removal for failing to allege the citizenship of the trustees under the Americold Realty Trust is cured because the Supplemental Brief offers evidence as to the citizenship of the trustees. *Id.* at 1.

Appellants concur with Appellees' conclusion that diversity jurisdiction exists. If the Notice of Removal was not sufficient to establish diversity jurisdiction through the trustees' citizenship, any defective allegations of jurisdiction may be amended in this Court. 28 U.S.C. § 1653.

[5] Appellants also agree that the presence of the three District Court plaintiffs,[1] who are not parties to this appeal, does not impact this Court's diversity jurisdiction. However, if the Court determines that diversity issues exist, then the Court should take curative action to exercise jurisdiction. This Court's authority to dismiss dispensable nondiverse parties is "well established." The Court should exercise this authority if necessary to avoid dismissal of this action.

---

[1] Kraft Foodservice, Inc. ("Kraft"), Safeway, Inc. ("Safeway"), and Phillips Confections, Inc. d/b/a Phillips Confections and Hanover, Inc. ("Hanover") were plaintiffs in the District Court, but did not join in this appeal.

A. The ability of this Court to dismiss dispensable nondiverse parties to preserve jurisdiction is "well established." Nondiverse parties should be dismissed as dispensable where their dismissal is not prejudicial to any party.

As a general rule, federal jurisdiction is determined based on the facts as they existed at the time the complaint or notice of removal was filed. *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1223 (10th Cir. 2011); *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995); *see also Herber v. Wal-Mart Stores*, 886 F. Supp. 19, 20 (D. Wyo. 1995) ("[U]nder *Laughlin*, the jurisdictional allegation is determined as of the time of filing the Notice of Removal." (citing *Laughlin*, 50 F.3d 871)).

However, this "time-of-filing" rule has "one well-established exception." *Ravenswood*, 651 F.3d at 1223. Federal courts "can dismiss a dispensable nondiverse party pursuant to Fed. R. Civ. P. 21 to cure a jurisdictional defect at any [6] point in the litigation, including after judgment has entered." *Id.* (citing *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 572, 124 S.Ct. 1920, 1925 (2004)); *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998) (approving district court's dismissal of nondiverse trustee to preserve diversity); *see also* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."). Fed. R. Civ. P. 19(b) lists the following factors for

determining whether a party is indispensable: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b).

Courts of appeals have authority to dismiss dispensable nondiverse parties. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837, 109 S. Ct. 2218, 2225 (1989); *Ravenswood*, 651 F.3d at 1225 (citing *Newman-Green, Inc.*, 490 U.S. at 827, 109 S. Ct. at 2220). The U.S. Supreme Court in *Newman-Green, Inc. v. Alfonzo-Larrain* noted that this authority "should be exercised sparingly" based on "whether the dismissal of a nondiverse party will prejudice any of the parties in the [7] litigation." 490 U.S. at 838, 109 S. Ct. at 2225. In that case, however, the Court reversed the Seventh Circuit Court of Appeals for failing to dismiss a nondiverse party. *Id.* at 838, 109 S. Ct. at 2226.

There, an Illinois corporation brought claims for, *inter alia*, breach of a guaranty against four Venezuelan citizens and a United States citizen domiciled in Venezuela. *Id.* at 828, 109 S. Ct. at 2220. After several years of discovery and pretrial motions, the District Court entered summary judgment. *Id.* At oral argument before the Seventh Circuit Court of Appeals, the

court questioned the basis for diversity jurisdiction – an issue which had not previously been raised in the case. *Id.* The court determined that diversity jurisdiction was destroyed because one of the four guarantors was "stateless"; *i.e.*, he was a U.S. citizen without a domicile in any State. *Id.* at 829, 109 S. Ct. at 2221. The Seventh Circuit did not dismiss the lawsuit, however. *Id.* at 829-30, 109 S. Ct. at 2221. Instead, the court remanded the case to the district court to determine whether the guarantor should be dismissed as a nondiverse dispensable party under Fed. R. Civ. P. 21. *Id.* at 830, 109 S. Ct. at 2221.

The U.S. Supreme Court reversed the Seventh Circuit and held that the Seventh Circuit should have dismissed the guarantor as a dispensable nondiverse party, instead of remanding to the district court. *Id.* at 826, 837-38, 109 S. Ct. at 2225-26. The Court held that none of the parties would be harmed by dismissal of [8] the "jurisdictional spoiler[]" because (a) discovery directed to the guarantor would have been available to the plaintiff even if the nondiverse guarantor had not been a party; and (b) because all of the guarantors were jointly and severally liable, the only person who faced prejudice was the nondiverse guarantor. *Id.* at 830, 838, 109 S. Ct. at 2221, 2225-26. The *Newman-Green* Court stressed that "requiring dismissal of the suit after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants awaiting judicial attention." *Id.* at 827, 109 S. Ct. at 2220.

In *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, this Court affirmed a district court's dismissal of a nondiverse trustee to preserve diversity jurisdiction. 136 F.3d 1365, 1373 (10th Cir. 1998). After concluding that the citizenship of trustees determined the Court's diversity jurisdiction, the Court analyzed the Fed. R. Civ. P. 19(b) factors for determining dispensability. The *Lenon* Court rejected the defendant's argument that it could be prejudiced by the dismissed trustee filing a separate state court action. *Id.* at 1373. "This contention," the Court found, "fails to consider the res judicata effect of a judgment against the trustees, since all trustees would be suing in their representative capacities and almost certainly be found to be in privity with each other." *Id.* The Court found dismissal was proper for the additional reason that the trustee's nondiversity and the issue of whether or [9] not he was indispensable "did not arise until two years after plaintiffs filed their complaint." *Id.* at 1373.

Finally, in *Harris v. Illinois-California Exp., Inc.*, this Court found that a nondiverse passenger's intervention in the driver's personal injury lawsuit against various defendants did not defeat diversity jurisdiction. 687 F.2d 1361, 1369 (10th Cir. 1982). The Court reasoned that while the claims advanced by the driver and passenger arose out of the same vehicle collision and thus had common legal issues and an "identical aggregate core of operative facts," the two parties' claims were "not dependent one on the other and may be maintained independently." *Id.* at 1367.

The *Harris* Court held that the passenger was a dispensable party to the driver's "separate" action such that the passenger's later-asserted claims did not defeat diversity jurisdiction. *Id.* at 1367-69.

B. Here, Appellants and Appellees agree they will not be prejudiced if Safeway and Hanover are dismissed. Moreover, Safeway and Hanover will clearly not be prejudiced because they have elected to not appeal the District Court's judgment. If necessary to preserve diversity, Safeway and Hanover should be dismissed as dispensable nondiverse parties.

In this case, there are seven trustees of the Americold Trust. Exhibit A to Appellees' Supplemental Brief at ¶ 8. Two of these individuals are citizens of Massachusetts and California *Id.* While Safeway and Hanover hold principal places of business in California and Massachusetts, respectively, these parties did not appeal the District Court's judgment. However, even if Safeway and Hanover [10] must be considered for purposes of diversity jurisdiction, this Court should exercise its "well-settled" authority to prevent these dispensable nondiverse parties from "spoiling" diversity jurisdiction.

Dismissal of Safeway and Hanover is proper because Appellants and Appellees agree that no parties will be prejudiced. Appellees' Supplemental

Brief at 8 ("Their [the non-appealing plaintiffs'] absence does not prejudicially affect any remaining party. . ."). Thus, the only remaining question is whether Safeway and Hanover would face any prejudice by being dismissed under Fed. R. Civ. P. 21. Safeway and Hanover cannot be prejudiced by dismissal because they have already elected to not appeal the District Court's judgment. Dismissal to preserve diversity will not impact any remedies available to Safeway and Hanover that they have not already abandoned.

Moreover, Appellants ConAgra and Swift have asserted a separate and distinct breach of contract claim against Appellees. Indeed, the breach of contract claim at issue in this case was pleaded by ConAgra and Swift as a separate count, distinct from Safeway's and Hanover's breach of contract claims. *See* Aplt. App. at A21-A23, A24-A25 (Counts II, III, V). As in *Harris*, Appellants' separate claims involve common issues of law, but are not "dependent" upon the presence of the non-appealing District Court plaintiffs. As such, no party will be prejudiced by dismissal of Safeway and Hanover. Accordingly, no protective provisions need [11] to be fashioned by this Court. The first two factors for dispensing nondiverse parties are met.

The third factor for determining dispensability, which includes public and judicial interests in complete and efficient resolution of disputes, *Lenon*, 136 F.3d at 1373, weighs heavily in favor of preserving diversity. The potential nondiversity of two Americold

trustees did not arise until one year and eight months after Appellees filed their Notice of Removal. Remanding to the District Court or forcing the parties to begin anew "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants awaiting judicial attention." *Newman-Green, Inc.*, 490 U.S. at 827, 109 S. Ct. at 2220. Finally, the fourth factor, the availability of an alternate forum if the action is dismissed, "is not a sufficient reason by itself" for dismissing an action for nonjoinder. *Lenon*, 136 F.3d at 1373 (citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996)).

If necessary to preserve diversity, this Court should enter its Order dismissing Safeway and Hanover as dispensable parties. Alternatively, this Court has held that trustees may be dismissed as a dispensable nondiverse party to preserve diversity jurisdiction. *Lenon*, 136 F.3d at 1369-73. While not named parties to this case, the Court should disregard the citizenship of the nondiverse, dispensable trustees to preserve diversity jurisdiction if necessary.

[12] CONCLUSION

Appellants and Appellees agree that diversity jurisdiction exists. If, however, this Court determines that diversity issues exist, then the Court should exercise its "well established" authority to dismiss

dispensable nondiverse parties to preserve its diversity jurisdiction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONAGRA FOODS, INC., f/k/a Conagra, Inc.; SWIFT-ECKRICH, INC., Plaintiffs-Appellants, and KRAFT FOODSERVICE, INC.; SAFEWAY, INC.; PHILLIPS CONNECTIONS, INC., d/b/a Phillips Connections and Hanover, Inc., Plaintiffs, v. AMERICOLD LOGISTICS, LLC; AMERICOLD REALTY TRUST, Defendants-Appellees.	No. 13-3277 (D.C. No. 2:13-CV-02064-JWL-KGS)

JUDGMENT

(Filed Jan. 27, 2015)

Before **LUCERO**, **MURPHY**, and **MCHUGH**, Circuit Judges.

This case originated in the District of Kansas and was argued by counsel.

The case is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 1, 2015

Clerk
United States Court of Appeals for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Americold Logistics, LLC, et al.
v. ConAgra Foods, Inc., et al.
No. 14-1382
(Your No. 13-3277)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

Supreme Court, U.S.
FILED
NOV 23 2015
OFFICE OF THE CLERK

No. 14-1382

IN THE

Supreme Court of the United States

AMERICOLD LOGISTICS, LLC, ET AL.,

Petitioners,

v.

CONAGRA FOODS, INC., ET AL.,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONERS

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NOVEMBER 2015

QUESTION PRESENTED

Is the citizenship of a trust for purposes of federal diversity jurisdiction based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both?

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Americold Realty Trust is a Maryland real estate investment trust. Americold Realty Trust has no parent corporation, and no publicly held company owns 10% or more of its stock. Petitioner Americold Logistics, LLC is 100% owned by Art Al Holding LLC, which in turn is 100% owned by Americold Realty Operating Partnership LP. Americold Realty Operating Partnership LP is 99% owned by Americold Realty Trust and 1% owned by Americold Realty Operations Inc. Americold Realty Operations Inc. is 100% owned by Americold Realty Trust.

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In the Supreme Court of the United States

No. 14-1382

AMERICOLD LOGISTICS, LLC, ET AL., PETITIONERS

v.

CONAGRA FOODS, INC., ET AL.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Tenth Circuit's decision is reported at 776 F.3d 1175 (10th Cir. 2015) and is reprinted at Petitioners' Appendix ("Pet. App.") 1-16. The Tenth Circuit's order denying Petitioner's request for rehearing *en banc* (Pet. App. 41-42) is unreported. The Tenth Circuit's order staying the mandate pending this Court's review (Pet. App. 19-20) is unreported. The underlying opinion of the District of Kansas (Pet. App. 23-40) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2015. That court denied a timely petition for rehearing *en banc* on February 23, 2015. The petition for writ of certiorari was filed on May 15, 2015, and was granted on October 1, 2015. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 28 U.S.C. § 1332(a), which provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state . . . ;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT

A. The Structure of Americold Realty Trust and the Powers of its Board of Trustees

Petitioner Americold Realty Trust ("Americold Trust" or "the Trust") is a real estate investment trust organized under the law of Maryland. It is the indirect owner of Petitioner Americold Logistics, LLC ("Americold Logistics").[1] The Trust is controlled by a Board of Trustees. Pet. App. 56. The trustees control virtually all aspects of the Trust. The Articles of Amendment and Restatement of the Trust provide the trustees with

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[1] Concurrent with the filing of this brief, the Parties are filing a Joint Motion to Dismiss Non-Diverse Party Americold Logistics LLC as a party to this proceeding pursuant to Rule 21 of the Federal Rules of Civil Procedure.

"full, exclusive and absolute power, control and authority over any and all property of the Trust." Pet. App. 60.

B. The Earlier State Court Proceedings

This action stems from a 1991 fire in an underground storage facility owned and operated by Americold Corporation, the predecessor to Petitioner Americold Trust. In April 1992, several resulting lawsuits were filed in Kansas state court against Americold Corporation by, among others, Respondents ConAgra Foods, Inc. and its wholly owned subsidiary, Swift-Eckrich, Inc. (collectively, "ConAgra"). These actions were consolidated (the "Kansas Action").

The Kansas Action was settled in March 1994. The settlement gave ConAgra the right to seek recovery from Americold Corporation's insurance carriers, including Northwestern Pacific Indemnity Company ("NPIC"). The settlement also provided for the entry of consent judgments against Americold Corporation. Pet. App. 25-27.

ConAgra commenced state court garnishment proceedings against Americold Corporation's insurers, including NPIC. Pet. App. 28. That litigation lasted eighteen years, from 1994 to 2012, including three trips to the Kansas Supreme Court. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (1997) ("*Americold I*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231 (1999) ("*Americold II*"); *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 270 P.3d 1074 (2011) ("*Americold III*").

The garnishment action proceeded to a ten-week bench trial in state court in late 2005. NPIC sought dismissal of the garnishment proceedings on the ground that the consent judgments had become

dormant and extinct under Kansas law. That motion was denied and judgment was entered against NPIC. Pet. App. 28.

The Kansas Supreme Court reversed. It held that, because "Americold [Corporation] was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold." Pet. App. 29. As a result, the court held, plaintiffs' underlying judgments were extinguished and the state court lacked jurisdiction to proceed with the garnishment action. The Kansas Supreme Court remanded the matter to the state district court with instructions to dismiss the garnishment proceedings. *Ibid.* The district court dismissed the garnishment action and vacated the judgments. *Ibid.*

C. The Proceedings Below

ConAgra then filed this action in Kansas state court against Petitioners Americold Trust and Americold Logistics, asserting claims for breach of contract arising out of their refusal to execute documents that would allow Plaintiffs to execute on the 1994 consent judgments against Americold Corporation. Pet. App. 31-32. Rather than naming the individual trustees of Americold Trust, ConAgra named the Trust itself as a defendant.

Petitioners removed the case to the United States District Court for the District of Kansas based upon diversity of citizenship. No party challenged the removal, and the district court did not question the existence of subject-matter jurisdiction. The parties submitted a stipulation of facts and filed cross-motions for summary judgment. The district court granted Petitioners' motion in October 2013, holding that the consent judgments were extinguished as a matter of law

and could not be revived under Kansas law. Pet. App. 40.

Respondents appealed. The only parties to the appeal were the ConAgra entities, the Americold Trust, and Americold Logistics.[2]

After the parties had filed their merits briefs in the Court of Appeals for the Tenth Circuit, the panel assigned to the appeal *sua sponte* raised the issue of subject-matter jurisdiction. Specifically, the panel ordered supplemental briefing to address whether the notice of removal was insufficient to establish diversity of citizenship because it did not specify the citizenship of all of the beneficiaries of Americold Trust. Pet. App. 21-22.

Both parties submitted supplemental briefs in response to the court's order, and Petitioners also submitted a declaration setting out, among other things, the structure of the Trust and the citizenship of each of its trustees. The record further established that both ConAgra entities are incorporated in Delaware and that their principal places of business are in Nebraska and Illinois, respectively. The declaration submitted by Petitioners established that none of the trustees of the Trust was domiciled in, or was a resident of, Delaware, Nebraska, or Illinois. Pet. App. 57.

In its supplemental brief to the Tenth Circuit, Petitioners argued that, under *Navarro Savings Association v. Lee*, 446 U.S. 458, 464 (1980), the citizenship of a real estate investment trust such as Americold Trust

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[2] See note 1, *supra*. In addition to the ConAgra entities and the Americold entities, other parties were named in the Kansas Action and the later action in federal district court. Those other parties did not appeal the district court's judgment in Americold's favor and are no longer parties to this action.

is to be determined "solely by the citizenship of its trustees." Pet. App. 47. ConAgra concurred with Americold's position. J.A. 104-15.

D. The Court of Appeals' Decision

The Tenth Circuit found subject-matter jurisdiction lacking and remanded the matter to the district court with instructions to vacate the judgment and remand the case to state court. The Court of Appeals read *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), to require "that the citizenship of any non-corporate artificial entity [be] determined by considering all of the entity's members," Pet. App. 11, and concluded that diversity of citizenship was lacking because the record did not establish the citizenship of all of the beneficiaries of the Americold Trust. The court rejected the parties' argument that *Navarro* required reference only to the citizenship of the trustees, instead reading *Navarro* for "the far more limited proposition" that in a case where only the trustee is named as a party and the trustee is "a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries." Pet. App. 7 (citation omitted). The court disagreed with the decisions of other courts of appeals that have held—even after *Carden*—that where the trust itself is a party, *Navarro* requires reference to citizenship of the trustees of the trust, not its beneficiaries. *Ibid.* The court held, based on *Carden*, that "[w]hen the trust itself is party to the litigation, the citizenship of the trust is derived from all the trust's 'members,'" Pet. App. 13-14, and that, in this context, the trust's "members" include, at a minimum, all of its beneficiaries.

The court concluded that jurisdiction was lacking because there was no evidence supporting diversity of

citizenship when Americold Trust's beneficiaries were considered. Pet. App. 15. The Tenth Circuit denied Petitioners' request for rehearing *en banc*, but granted its request for a stay of mandate pending review by this Court. Pet. App. 19-20.

SUMMARY OF ARGUMENT

This case presents the important question of how federal courts should treat the citizenship of trusts, including real estate trusts, for purposes of diversity jurisdiction. The answer is that the Court should adhere to its longstanding practice of looking to the citizenship of trustees, who—both at common law and in modern practice—hold legal title to the property of the trust and accordingly are tasked with managing the trust's assets, including through the conduct of litigation.

This Court's most recent case addressing diversity jurisdiction in a case involving a trust was *Navarro*. In that case, the Court reviewed the features and operations of a business trust, concluding the trustees were the "real parties to the controversy" and that the various citizenships of the trust's thousands of beneficiaries were irrelevant to the diversity analysis. 446 U.S. at 465. *Navarro* was predicated upon what was then over 150 years (and what is now more than 200 years) of Supreme Court case law governing trusts. The Court found prior cases inquiring into diversity jurisdiction for corporations and unincorporated entities inapplicable because a trust is "neither an association nor a corporation." *Id.* at 462.

In *Navarro*, as in the Court's prior cases involving trusts and trustees, the Court concluded that "a trustee is a real party to the controversy for purposes of diversity jurisdiction," and thus the trustee's citizen-

ship is controlling, when the trustee "possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." 446 U.S. 458 at 464 (citing *Bullard v. City of Cisco*, 290 U.S. 179, 189 (1933)). This is the test the Tenth Circuit should have applied here, where the trustees of Americold Trust possess virtually the same powers and authority over the Americold Trust as did the trustees in *Navarro*. At common law, as reflected in this Court's jurisprudence, such powers are held by the trustees, not the beneficiaries, and the trustees rather than beneficiaries are the parties authorized to sue, to be sued, and to conduct litigation where trust assets and liabilities are at issue. That principle suffices to resolve this case.

The Court of Appeals chose instead to rely on a case involving no trust, no trust property, no trustees, and no trust beneficiaries: *Carden v. Arkoma Associates*, 494 U.S. 185, 186 (1990). That was error. *Carden* presented two questions: first, whether a limited partnership can be treated like a corporation, with its own citizenship for purposes of diversity jurisdiction; and second, alternatively, whether a court may instead consult the citizenship of only a subset of the partners in the partnership for purposes of diversity jurisdiction. See *id.* at 187. Following a long line of cases governing the citizenship of unincorporated associations for diversity purposes, *Carden* unremarkably held that the partnership itself has no citizenship, and that instead the citizenship of all the partnership's "members" must be examined. *Id.* at 189-90, 195-96.

Carden does not control here because this case presents neither of the questions before the Court in *Carden*. No party contends that a trust should be afforded citizenship in its own right for purposes of

diversity jurisdiction, and likewise no party contends that a federal court should consult the citizenship of only a subset of any group of persons. The question, rather, is whether the court should consult the citizenship of all of the trust's *trustees* or all of its *beneficiaries*. *Carden* simply has nothing to say about that issue.

To the extent *Carden* is instructive at all, it confirms that the citizenship of trustees should control. *Carden* and the cases it cites hold that the citizenship of a non-corporate artificial entity is to be determined by reference to the entity's "members." 494 U.S. at 185-86. The reason for that approach is that, at common law, partnerships and associations could not sue or be sued in their own name. The "members" of such an entity consisted of those persons who, at common law, would have been individually liable for the entity's obligations and in a position to sue or be sued on its behalf. In a series of cases, this Court held that, although the law had changed in certain states to permit partnerships and associations to sue and be sued in their own names, for purposes of diversity jurisdiction federal courts would continue to consult the citizenship of those individuals who would themselves have been the litigants in such cases at common law.

In the trust context, the analogue of a "member" of such an entity is the trustee. At common law, as with partnerships and associations, trusts could not sue or be sued in their own name. It was—and remains—the trustee, and not the beneficiaries, who held legal title to trust property and was individually liable for a trust's obligations. That key fact places the trustee, and not the beneficiaries, in the position akin to the partners of a partnership or the members of an association for purposes of diversity jurisdiction.

It is immaterial that, as the Tenth Circuit posited, the functional realities of modern business may place the beneficiaries of a business trust in a position akin to the limited partners of a partnership. This Court, including in both *Carden* and *Navarro*, consistently has resisted the argument that the changing realities of modern business justify a departure from its longstanding approach of looking to the citizenship of those who would have been liable at common law for the obligations of a non-corporate artificial entity. The need for a bright line rule, firmly grounded in the common law and applicable to all of the many different kinds of trusts that exist under state law, counsels strongly against an approach that hinges on an analysis of how particular types of trusts operate. To the extent any change in the diversity statute is warranted to reflect the functioning of modern business trusts, Congress is fully capable of amending the diversity statute accordingly, as it has done on multiple prior occasions to address other specific circumstances.

In addition to departing from the common law and this Court's precedents, the Tenth Circuit's approach would raise a number of significant practical and policy concerns. Because trustees (unlike beneficiaries) may sue and be sued in their own names where trust assets and liabilities are at issue, the Tenth Circuit's rule would create a vehicle for gamesmanship and forum shopping: the outcome of the citizenship inquiry would hinge on the (otherwise meaningless) distinction of whether the plaintiff names as defendants the trustees (triggering an inquiry into the citizenship of the trustees) or the trust itself (triggering an inquiry into the citizenship of the beneficiaries).

The Tenth Circuit's approach also would prove complicated and unworkable in practice. Not all trusts have identifiable or easily ascertainable beneficiaries, and many trusts have hundreds or thousands of beneficiaries. See *Navarro*, 446 U.S. at 464 (9,500 beneficiaries). In sharp contrast, *all* trusts have trustees, and they are, generally speaking, relatively few in number and easily identifiable. Looking to the citizenship of trustees rather than beneficiaries is in keeping with the Court's admonition that jurisdictional inquiries should be "as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

The issue before the Court is not novel and, despite the Court of Appeals' ruling, should not end in a complicated result. The common law of trusts and this Court's longstanding approach of looking to the citizenship of trustees require reversal.

ARGUMENT

A. The Court Should Adhere to Its Longstanding Practice, in Accordance With the Common Law, of Consulting the Citizenship of Trustees for Purposes of Evaluating Diversity of Citizenship in a Case Involving a Trust

Diversity jurisdiction is based upon Article III of the Constitution. U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to ... Controversies ... between Citizens of different states."). The Judiciary Act of 1789, enacted by the First Congress, vested lower federal courts with jurisdiction where a "suit is between a citizen of the State where the suit is brought and a citizen of another State." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73. The diversity statute has been

amended over time, but remains substantively unchanged at its core—requiring a threshold amount in controversy and diverse citizenship. In its present form, the diversity statute is codified at 28 U.S.C. § 1332.

In an unbroken line of cases involving trusts, the Court has held that where a trustee "possesses certain customary powers to hold, manage, and dispose of trust assets for the benefit of others," the trustee is "a real party to the controversy" in litigation involving trust assets and liabilities, and the trustee's citizenship, rather than that of the beneficiaries, is controlling for purposes of determining whether diversity jurisdiction exists. *Navarro*, 446 U.S. at 464; see also, e.g., *Bullard*, 290 U.S. at189-90 (citizenship of trustees, not beneficiaries, governs; "[t]he beneficiaries were not necessary parties and their citizenship was immaterial"); *Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 218 (1904) (citizenship of trustees governed even though state university's board of trustees was the named party, rather than individual trustees); *Dodge v. Tulleys*, 144 U.S. 451, 455-56 (1892) (trustee was "the proper party in whose name to bring suit"; beneficiaries' citizenship was irrelevant because "the trustee represents ... all [beneficiaries], and in his name the litigation is generally and properly carried on"); *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 175, 178 (1870) (the rule governing trustees "suing for others' benefit" is that "[i]f they are personally qualified by their citizenship to bring suit in the Federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified"); *Bonnafee v. Williams*, 44 U.S. (3 How.) 574, 577 (1845) ("A person having the legal right may sue, at law, in

the federal courts, without reference to the citizenship of those who may have the equitable interest."); *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808) (citizenship of trustees, not testators, controlled: "although [the plaintiffs] sue[d] as trustees, [] they were entitled to sue in the circuit court"); accord 13E C. Wright & A. Miller, Federal Practice & Procedure Jurisdiction § 3606 (3d ed. West 2015) ("The citizenship of an active trustee, rather than that of the beneficiaries or of the grantor, is decisive.").

In *Navarro*, this Court applied these longstanding rules to a business trust. The issue was "whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." 446 U.S. at 458. Following its long line of trust cases, the Court noted that the trustees (1) held title to the trust's real estate investments for the benefit of the trust shareholders; (2) had exclusive authority over the trust property; (3) had the power to transact business on behalf of the trust; and (4) were authorized to initiate or compromise lawsuits relating to the trust. *Id.* at 459. They were, in short, "active trustees whose control over the assets held in their names is real and substantial." *Id.* at 465. As a result, the Court had no trouble resolving the case based squarely upon the Court's longstanding rule that the citizenship of a trustee controls for purposes of diversity jurisdiction.

The Court in *Navarro* expressly rejected the petitioner's argument that the practical realities of a business trust's operations meant that the Court should consult the citizenship of the beneficiaries rather than the trustees. The critical fact remained that the *Na-*

varro trustees had the customary powers and duties of trustees, and the beneficiaries, as is ordinarily true, "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro*, 446 U.S. at 464-65. As the Court explained, "[t]hat the trust may depart from conventional forms in other respects has no bearing upon" the outcome of the case. *Id.* at 465. "Nor does [the trust's] resemblance to a business enterprise alter the distinctive rights and duties of the trustees." *Ibid.* The entity at issue was "neither an association nor a corporation," but rather an "express trust," *id.* at 462, and it made no difference that the trust was organized for business purposes rather than personal or charitable ones. Under this Court's precedents, so long as the trustees' "control over the assets held in their names" was "real and substantial," the citizenship of the trustees controlled for purposes of diversity jurisdiction. *Id.* at 465.

Navarro and the trust cases upon which it relied are part of a larger body of this Court's jurisprudence holding that where a bona fide personal representative is authorized by law to conduct litigation on behalf of another, it is the personal representative's citizenship that controls, unless Congress provides otherwise by statute. See, e.g., *Mexican Cent. Ry. Co. v. Eckman*, 187 U.S. 429, 434 (1903) (citizenship of guardian rather than ward controls); *Indiana ex rel. Stanton v. Glover*, 155 U.S. 513, 517 (1895) (citizenship of relator rather than governmental entity in whose name suit is brought controls); *Venner v. Great N. Ry. Co.*, 209 U.S. 24, 32 (1908) (citizenship of plaintiff in shareholder derivative suit rather than corporation controls); *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 186-

87 (1931) (citizenship of administrator of estate rather than decedent controls), *superseded by statute*, see 28 U.S.C. 1332(c)(2); *Chappedelaine*, 8 U.S. (4 Cranch) at 307 (citizenship of representatives, not testators, controls). In all of these cases, as in litigation involving trusts and trustees, this Court has recognized that the duly appointed representative or fiduciary of another party is the proper real party in interest for citizenship and diversity purposes.[3]

There is a simple reason why the Court's jurisprudence always has looked to the citizenship of trustees in cases involving trust assets and liabilities: at common law, all trust litigation, both affirmative and defensive, was the responsibility of the trustees and was conducted in their name. This was because the trustees held legal title to all trust property. See, e.g., Restatement of Trusts § 280 (1935) ("The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the property free of trust."); *id.* § 261 ("The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent he would be liable if he held the property free of trust."); A.M. Hess, et al., Bogert's Trusts & Trustees §§ 712, 720, 731 (West 2015) (at common law, trustees are personally liable in

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[3] Where a nominal litigant is added solely to create or destroy the court's jurisdiction purposes—such as in the case of a sham appointment of a representative or a fraudulent assignment—the Court ignores the nominal litigant's citizenship. See 28 U.S.C. § 1359; see also, e.g., *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954); *McNutt v. Bland*, 43 U.S. (2 How.) 9, 14 (1844). But that is not the case here—there is no dispute that the trustees here, as in *Navarro*, are bona fide trustees and not mere nominal parties.

tort and contract for trust liabilities); 4 A.W. Scott et al., Scott & Ascher on Trusts § 26.1 (5th ed. 2007) (at common law, "the general rule was that all obligations incurred during the course of trust administration were personal obligations of the trustee"); 5 Scott & Ascher on Trusts § 28.1 ("it is the trustee who is the proper party to maintain [an] action" on behalf of the trust, "whether at law or in equity").

This rule has been applied consistently by federal and state courts dating back to the founding of our nation. See, e.g., *Lazenby v. Codman*, 116 F.2d 607, 609 (2d Cir. 1940) (a "trust is not a juristic person and the trustee is the only party entitled to bring suit to enforce" trust's claims); *Larson v. Sylvester*, 185 N.E. 44, 45-46 (Mass. 1933) ("[A] trust is not a legal personality" and generally "cannot be sued. It is represented by the trustee. He embodies it. He holds title. He deals with the property in which trust rights exist. Contracts with regard to the rights and property affected by trusts are the contracts of the trustee. He, in person, is liable upon them."). Accord *Bryan v. Stevens*, 4 F. Cas. 510, 510 (C.C.S.D.N.Y. 1841) (*per curiam*); *Bank Acres Pure Trust v. Fahnlander*, 443 N.W.2d 604, 605 (Neb. 1989); *Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 522 (2010).

Indeed, the core principle of these precedents—that legal title to trust property is vested in the trustee alone—is deeply rooted in centuries-old English common law dating back to the ecclesiastical courts. See 4 J. Kent, Commentaries on American Law 304 (Da Capo Press ed. 1971) (trust is an obligation arising out of confidence reposed in the trustee, who has legal title to property conveyed to him and the power to manage that property consistent with the terms of the trust); 2

W. Blackstone, Commentaries on the Laws of England 335-36 (Univ. of Chicago Press ed. 1979) (describing the recognition by the courts of equity of trusts, in which "the land must remain in the trustee to enable him to perform the trust"); F.W. Maitland, Equity 26-27 (Cambridge Univ. Press ed. 1920) (feoffees in the "use" structure "are to be the legal owners," with beneficiaries holding the right to enjoy and profit from the property); 4 W. Holdsworth, A History of English Law 417 (Methuen & Co. Ltd. & Sweet & Maxwell, 3d ed. 1945) (under the "use" arrangement, the legal owner of property was separate from the beneficiary, the former being vested with legal title and the latter being given "all the advantages of property, and yet ... subject to none of the legal liabilities which property entails"); R.H. Helmholz, The Early Enforcement of Uses, 79 Colum. L. Rev. 1503, 1503 & n.2, 1505 (1979) (noting that the "essence of the 'use'," which was the "ancestor of the modern trust," was "the separation of legal title to land from its beneficial enjoyment").

It is equally well established at common law that beneficiaries, with narrow and well defined exceptions, *cannot* sue or be sued based on the assets or liabilities of the trust. Such litigation is the sole province of the trustee. As one learned treatise explains:

> The trustee is in many respects a buffer between the beneficiaries and the outer world. It is the trustee's duty to take and keep control of the trust property, to preserve it, and to enforce claims held in trust. It is the trustee rather than the beneficiary who is entitled to maintain actions against third parties who commit torts with respect to the trust property or fail to pay debts held in trust. ... It is through the trustee rather

> than directly that the beneficiaries ordinarily pursue to the third party.

5 Scott & Ascher on Trusts § 28.1; see also, e.g., *id.*, § 27.1 ("[Third parties] certainly ha[ve] no direct claim against the beneficiaries. Trust beneficiaries are not subject to personal liability to third persons on account of obligations incurred by the trustee."); Restatement of Trusts § 274 ("The beneficiary as such is not personally subject to liabilities to third persons incurred in the administration of the trust."); *id.* §§ 281, 282 ("Where the trustee could maintain an action at law or suit in equity or other proceeding against a third person," beneficiary generally cannot maintain suit, with narrow exceptions); Restatement (Third) of Trusts § 107, cmt. c(2) (2003) ("It bears repeating that the trustee, and not a beneficiary, is ordinarily the proper person to bring (and to decide whether to bring) an action on behalf of the trust against a third party."); *In re Sharif*, 457 B.R. 702, 718 (Bankr. N.D. Ill. 2011) ("[A] trust beneficiary cannot sue or be sued regarding the trust."); *Slaughter v. Swicegood*, 591 S.E.2d 577, 584 (N.C. Ct. App. 2004) (noting "common law rule barring individual claims by beneficiaries"); *Koelliker v. Denkinger*, 83 P.2d 703, 707 (Kan. 1938); *Fitzgerald v. Doggett's Ex'r*, 155 S.E. 129, 134 (Va. 1930).

Only in "limited circumstances," Restatement (Third) of Trusts § 107, cmt. c, may a beneficiary bring an action. Such limited circumstances generally involve situations where the trustee is unable or improperly unwilling to bring suit, or where the beneficiary is in immediate possession of the trust property at issue. See, e.g., *id.* § 107; Bogert's Trusts & Trustees § 869; 5 Scott & Ascher on Trusts § 8.1; *Slaughter*, 591 S.E.2d at 584; *Schofield v. Cleveland Trust Co.*, 78 N.E.2d

167, 171 (Ohio 1948); *Farmers' Loan & Trust Co. v. Lake St. Elevated R.R. Co.*, 122 F. 914, 921 (7th Cir. 1903).

In short, the common law always and unmistakably has placed trustees, rather than beneficiaries, in control of litigation involving trust assets and liabilities. This Court's consistent approach of looking to the citizenship of trustees, not that of the beneficiaries, for purposes of diversity jurisdiction in trust-related litigation is a logical and necessary application of that common law rule. The trustee, rather than the beneficiary, holds legal title to trust property and is the "real part[y] to the controversy" in such litigation. *Navarro*, 446 U.S. at 461. And because the trustee is responsible for the conduct of the litigation and will be publicly identified with the litigation, it is the citizenship of the trustee, rather than that of the beneficiaries, that is relevant for the purposes of ensuring a "neutral forum" in federal court—the main purpose of diversity jurisdiction. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

The Americold Trust falls squarely within the *Navarro* principle. Like the trustees in *Navarro*, Americold's trustees hold legal title to, and have broad and virtually complete power over, the assets of the trust. Americold's Articles of Amendment and Restatement provide that "the business and affairs of the Trust shall be managed under the direction of the Board of Trustees and ... the Board shall have full, exclusive and absolute power, control and authority over any and all property of the Trust." Pet. App. 56, 60. The trustees even have the authority to terminate the trust itself. *Id.* at 61. That suffices to resolve this case.

B. *Carden* and the Cases Involving Unincorporated Associations Do Not Warrant a Departure from the Court's Practice of Consulting the Citizenship of Trustees

Rather than follow the *Navarro* line of cases, the Tenth Circuit believed that this Court's decision in *Carden* required it to consult the citizenship of the *beneficiaries* of the Americold Trust. Pet. App. 11. That was error. *Carden* is among the most recent in a line of cases addressing the citizenship, for purposes of diversity jurisdiction, of unincorporated artificial entities such as partnerships and associations. These cases have little to say about the separate and distinct question whether the citizenship of trustees or the citizenship of beneficiaries should control in litigation involving trusts. To the extent the *Carden* line of cases sheds any light on the question, it confirms that federal courts should look to the citizenship of trustees, and not that of beneficiaries, in cases involving express trusts, including business trusts.

In *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), the Court first held that, for jurisdictional purposes, a corporation is to be treated as an artificial entity with the citizenship of its state of incorporation. *Id.* at 558. Congress altered that rule slightly in 1958, when it amended the diversity statute to provide that a corporation shall be deemed a citizen of both its state of incorporation and the state in which it maintains its principal place of business. See *Carden*, 494 U.S. at 196; 28 U.S.C. § 1332(c)(1); Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415.

In cases involving unincorporated business associations, by contrast, the Court has held (with one excep-

tion) that such entities are not to be treated as citizens in their own right for purposes of diversity jurisdiction. Rather, as the Court reaffirmed in *Carden*, a federal court must consult the citizenship of "all of the entity's members." 494 U.S. at 196 (addressing a limited partnership); accord *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151 (1965) (union); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456-57 (1900) (limited partnership); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (joint-stock company). But cf. *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 482 (1933) (treating Puerto Rican *sociedad en comandita* as an entity akin to a corporation, with its own citizenship). In so holding, the Court has erected a "'doctrinal wall'" between corporations and other artificial entities, with only the former being deemed to have citizenship in their own right for purposes of diversity jurisdiction. *Carden*, 494 U.S. at 190 (quoting *Bouligny*, 382 U.S. at 151).[4] That question is not implicated in this case, as no party contends that a trust should be treated as a citizen in its own right.

Carden also resolved a second question. The Court rejected the argument, advanced by the respondent,

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[4] In reaching this result, the Court rejected an argument by the respondent (and the dissent) that *Navarro* provided support for affording the limited partnership citizenship in its own right. The Court noted that the plaintiffs in *Navarro* were trustees suing in their own name, rather than that of the trust, so the Court had no occasion to discuss "whether the trust had attributes making it a 'citizen.'" *Carden*, 494 U.S. at 191; *see also id.* at 192-93 (noting that *Navarro* had "nothing to do with the citizenship of the 'trust,' since it was a suit by the trustees in their own names"). Because no party here contends that a trust should be afforded citizenship in its own right, this discussion of *Navarro* in *Carden* has no bearing on this case.

that in cases involving limited partnerships, courts should consult the citizenship of the general partners only, and not the limited partners. 494 U.S. at 192. The Court instead "adhere[d] to [its] oft-repeated rule that diversity jurisdiction in a suit by or against [an artificial] entity depends on the citizenship of 'all the members'" of the entity. *Id.* at 195 (quoting *Chapman*, 129 U.S. at 682). The Court dismissed the respondent's contention that such a rule was overly "technical, precedent-bound, and unresponsive to policy concerns raised by the changing realities of business organization," in which limited partners did not play an active role in the entity's management. *Id.* at 196. The Court recognized that "limited partnerships are functionally similar" to corporations, but nonetheless made clear that formalism, rather than pragmatism, "has been the character of our jurisprudence in this field after *Letson*." *Id.* The Court deemed it the province of Congress, rather than the judiciary, to make any "further adjustments" to the law in this area. *Id.*

This second holding of *Carden* has limited relevance here. No party contends that the citizenship of only some trustees, or of only some beneficiaries, should be consulted in determining the citizenship of a trust. The question, rather, is whether a court should consult the citizenship of *all* of the trustees, *all* of the beneficiaries, or both. Neither *Carden*, nor any of the other artificial entity cases upon which it relied, addressed that issue. And for good reason: the structure and nature of a trust are fundamentally different from the structure and nature of a partnership, association, or other artificial entity. Unlike partnerships or associations, which at common law have only a single tier of partners or members who presumptively share essen-

tially the same legal status, including normally sharing legal title to the trust property, a trust involves two distinct and very different tiers: that of the trustee and that of the beneficiaries—with legal title being placed in the former, and only (at most) beneficial or equitable title being held by the latter. See *supra* at 15.

Carden itself recognized this crucial point. The Court noted that trustees constitute a "distinctive common-law institution," and that their function within a trust provides limited guidance in cases involving "juridical person[s]." 494 U.S. at 194. That was why *Navarro* did not control the outcome in *Carden*, and so too is it why *Carden* does not control the outcome here. *Carden*'s refusal to distinguish between general and limited partners—a distinction unknown to the common law—provides no support for the conclusion that trustees and beneficiaries, which the common law has long viewed as separate, may be lumped together as "members" of a trust.

C. Trustees, Rather that Beneficiaries, Are the Analogues of the "Members" of a Partnership or Association

Even assuming, *arguendo*, that the Court's direction in *Carden* to consult the citizenship of an entity's "members" pertains here, that inquiry leads to the same outcome as the Court's cases involving trusts: a court should look to the citizenship of trustees rather than of beneficiaries. The "members" of an unincorporated association are those persons who would have been liable at common law for the artificial entity's obligations. In the case of a trust, that is the trustee, not the beneficiary.

At common law, like trusts, unincorporated business associations such as partnerships "were not recognized as legal entities capable of being sued by their creditors." 14 J. Callison & M. Sullivan, Partnership Law & Practice § 14:3 (West 2015); accord, e.g., *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385 (1922); *Johnston v. Albritton*, 134 So. 563, 565 (Fla. 1931). Rather, such an entity "could only sue or be sued in the names of its members." *United Mine Workers*, 259 U.S. at 385. That fact was the underpinning for the Court's consistent refusal to afford unincorporated associations any citizenship other than that of its members. The Court determined that, although some states had amended their laws to permit suits by or against unincorporated associations in their own name, for purposes of diversity jurisdiction, the Court would adhere to its longstanding rule of looking to the citizenship of the members of the entity. See *Jones*, 177 U.S. at 455-56 (although "plaintiffs are entitled to sue, and may be sued, by their association name ... [w]hen the question relates to the jurisdiction of a circuit court of the United States as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association"); *Chapman*, 129 U.S. at 682. The "members" of an unincorporated business association, therefore, remain what they were at common law: those persons who would have been liable individually at common law for the entity's obligations.

That principle points unmistakably toward the conclusion that, to the extent *Carden* suggests that a court must identify the "members" of a trust, it is the trustees, not the beneficiaries, who fit that description. As

set out above, at common law, trusts, like partnerships and associations, could not sue or be sued in their own name. Trustees, not beneficiaries, were personally liable for the trust's obligations, held legal title to trust property, including choses in action, and were tasked with bringing litigation against third parties to enforce the trust's affirmative claims. In this sense, trustees occupied the position for a trust that partners or members occupied for a partnership or association.

Indeed, several nineteenth century cases draw this exact parallel between trustees and members of unincorporated associations:

> This is a feature which clearly distinguishes corporations from voluntary associations. No such association can sue or be sued in its assumed name; but the *parties who compose it must appear before the court, or those in whom their property is vested in trust for them*. The distinction is between the collective existence appearing by its name, and individuals appearing by their names. In the former case, the court recognizes the body corporate as a legal existence, having a right to be heard; and in the latter, it recognizes individuals, who claim to be heard *in their own right, or as trustees for others*.

Thomas v. Dakin, 22 Wend. 9, 34-35 (N.Y. Sup. Ct. 1839) (emphases added). Numerous other cases are to the same effect. See, e.g., *Laughlin v. Greene & Weare*, 14 Iowa 92, 94 (1862) ("[A] voluntary association[ ] possess[es] no corporate powers" and may not "sue and be sued in [its own] name. This action must be maintained, therefore, if at all, for the benefit of the compa-

ny, in the name of the trustee. ... Plaintiff is the trustee of an express trust, within the meaning of the statute."); *Bryan*, 4 F. Cas. 510 (representatives of voluntary association were akin to trustees and could sue for the association without naming the association or its members); *Weaver v. Trustees of Wabash & Erie Canal*, 28 Ind. 112, 120 (1867) (trustees of unincorporated canal company could sue without making the company or its shareholders a party because the company was in effect an "express trust"); *Trustees of the Methodist Episcopal Protestant Church v. Adams*, 4 Or. 76, 88 (1870) (trustees of religious association may sue on behalf of association without naming association or its constituents); *Kuhl v. Meyer*, 35 Mo. App. 206, 211 (1889) (officers of unincorporated benevolent association, by virtue of terms of note, became trustees of an express trust and could sue in their own name in that capacity); *Hecker v. Cook*, 78 P. 311, 312 (Colo. App. 1904) (trustees of unincorporated council, under the terms of the bond at issue, were named as trustees on the obligation and "thereby made [themselves] trustees of an express trust" such that they could sue in their own name "without joining ... the person or persons for whose benefit the action is prosecuted").

By contrast, there appears to be no authority for the proposition that the beneficiary of a trust occupied at common law a position similar to that of a partner in a partnership or a member of an association. On the contrary, as noted above, beneficiaries generally may *not* sue or be sued where trust assets and liabilities are at issue. See *supra* at 17-18.

D. The Evolving Nature of Trust Law in Certain States, Permitting Some Trusts to Sue and Be Sued in Their Own Name, Does Not Warrant a Departure from the Court's Longstanding Practice of Consulting the Citizenship of Trustees

The only potentially meaningful difference between this case and *Navarro* is that, in this case, a trust is a party to litigation in its own name. See *Carden*, 494 U.S. at 192-193. That fact alone—which is the product of a relatively recent doctrinal innovation in certain states—does not warrant a departure from the Court's longstanding approach in cases involving trusts and trustees.

During the twentieth century, a number of states began to enact statutes allowing for the creation of a so-called "business trust"— also sometimes referred to as a "common law trust" or "Massachusetts trust"— which is a type of trust used for commercial purposes. See generally Bogert's Trusts & Trustees § 247. In some states (including Maryland, under whose law the real estate investment trust in this case was created) business trusts, but generally not traditional trusts, may sue and be sued in their own name. See, e.g., Md. Code Ann., Corps. & Ass'ns, § 8-301(2) (2013); Miss. Code Ann. § 79-15-23(1) (1962); Minn. Stat. Ann. § 318.02, subd. 3(2) (2011); Ariz. Rev. Stat. Ann. § 10-1879 (1996); *Morrison v. Lennett*, 616 N.E.2d 92, 94, n.7 (Mass. 1993). This relatively recent development helps explain why this Court has not yet addressed the question whose citizenship controls for diversity pur-

poses when a business trust is named as a party to the litigation.[5]

For several reasons, the fact that some litigation involving trusts now is being conducted in the name of the trust, rather than that of the trustee, does not warrant a departure from this Court's longstanding approach to trust-related litigation.

First, the ability of some trusts, in some states, to sue and be sued in their own name does not alter the fact that the trustee holds legal title to trust property and that trust-related litigation is controlled and conducted by the trustee. Even when a case involves a business trust with the ability to sue and be sued in its own name, it is the trustees, not the beneficiaries, who remain liable for the trust's obligations. See, e.g., Bogert's Trusts & Trustees § 247(K) ("According to the rule applicable to trusts generally, the trustees of a business trust would be liable personally for torts committed in the course of business, and also upon contractual obligations."); *First E. Bank, N.A. v. Jones*, 602 N.E.2d 211, 216 (Mass. 1992) (trustees of business trust remain liable for trust obligations); *Taylor v. Richmond's New Approach Ass'n*, 351 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 1977) (same); *Review Printing*

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[5] In other states, business trusts (like traditional trusts) lack the ability to sue or be sued in their own name. See, e.g., Bogert's Trusts and Trustees § 247(N); *Coverdell v. Mid-S. Farm Equip. Ass'n*, 335 F.2d 9, 13 (6th Cir. 1964) (under Tennessee law, business trust could not be sued in its own name; "the trustees would have been the proper parties defendant in the instant case rather than the trust"); *Booker v. Cappozziello*, No. CV054010211S, 2006 WL 2194653, at *2-3 (Conn. Super. Ct. July 21, 2006) (unpublished) (Connecticut law does not recognize a business trust as a separate legal entity capable of suing or being sued in its own name).

& Stationery Co. v. McCoy, 276 Ill. App. 580, 587-89 (1934) (noting "broad personal liability of trustees" for debts of business trust).

Likewise, actions on behalf of business trusts are prosecuted by trustees, not beneficiaries, even where the trustees have the option of bringing suit in either the trust's name or their own. See, e.g. Bogert's Trusts & Trustees § 247(M); *Stevens v. Sharpe*, 82 P.2d 672, 674 (Okla. 1938) (where state "statutes authorize the maintenance of an action by an express or common law trust in its adopted name," action is properly prosecuted by the trustee, who is the "real party in interest"); *Brickell Constr. Corp. v. Pujol*, 329 So. 2d 340, 340-41 (Fla. Dist. Ct. App. 1976) (trustees of business trust "are entitled to maintain this action on its behalf"); *Morriss v. Finkelstein*, 127 S.W.2d 46, 49-50 (Mo. Ct. App. 1939); *Hull v. Newhall*, 138 N.E. 249, 250 (Mass. 1923). Indeed, even where a business trust is party to litigation in its own name, that litigation generally is conducted by the trustees, not the beneficiaries. See, e.g., *Ittleson v. Anderson*, 2 F. Supp. 716, 720-21 (S.D.N.Y. 1933) ("The trustees can do business in the name of the trust; they can sue or be sued as an entity under Massachusetts law[.]"); *Limpia Royalties v. Cowden*, 94 S.W.2d 481, 482 (Tex. App. 1936) (business trust was properly sued in its own name, and trustees were proper parties to be served with process).

The trustee-centric nature of litigation, even in cases in which a business trust may sue or be sued in its own name, confirms the application of this Court's longstanding approach of looking to the citizenship of the trustees when a trust is involved.

Second, this Court has declined to alter its approach to diversity jurisdiction simply because certain states

enact laws that treat artificial entities as persons in their own right, with the capacity to sue or be sued. Since *Letson*, the Court consistently has rejected the argument that either the "changing realities of business organization," or changes in state laws responding to such realities, warrant a departure from the historical approach to diversity jurisdiction. *Carden*, 494 U.S. at 196; accord *id.* (formalism "has been the character of our jurisprudence in this field after *Letson*"); *Jones*, 177 U.S. at 455-56; *Chapman*, 129 U.S. at 682. On this point, *Navarro* is fully in accord with *Carden*. *Navarro* could not have been more explicit: for purposes of diversity jurisdiction, a business trust is to be treated no differently than a traditional trust. *Navarro*, 446 U.S. at 465 ("That the trust may depart from conventional forms in other respects has no bearing upon this determination. Nor does [the trust]'s resemblance to a business enterprise alter the distinctive rights and duties of trustees."); accord *id.* at 463, n.10 ("The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction.").

The Court would be breaking new ground by altering its approach to trust-related litigation in response to state law developments regarding the ability of some trusts to sue and be sued in their own name. Just as the evolution of state law permitting partnerships and unincorporated associations to sue and be sued in their own name did not warrant a departure from the Court's customary approach to those entities, neither should such developments change the rules for trusts.

Third, because a third party seeking to assert a claim against a business trust generally may sue either the trustees or the trust, it would invite gamesmanship

and forum-shopping to require that courts look to the citizenship of beneficiaries simply because, in a particular case, the trust is included as a party in its own name. There is little, if any, functional difference between suing a trust and suing the trustees, and this Court should not draw a jurisdictional line based on such a meaningless distinction.

The Tenth Circuit's rule would allow parties to decide whether federal jurisdiction exists simply through the expediency of choosing to sue in the name of the trust (thus invoking the beneficiaries' citizenship) or in the name of the trustee (thus invoking the trustees' citizenship alone). As such, that rule would contravene this Court's strong preference for jurisdictional rules that do not create opportunities for forum shopping. See *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004). By contrast, adherence to the traditional approach of looking to the trustees' citizenship creates no such opportunity for gamesmanship: regardless of the name of the party on the caption, the court would consult the citizenship of the trustees, so long as they meet the "real party to the controversy" test employed by *Navarro* and the cases upon which it relied. Cf. *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) ("Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who [are] defendants. ... Litigation is the pursuit of practical ends, not a game of chess.").

Fourth, as *Carden* also noted, 494 U.S. at 196, to the extent there may be some need to alter the Court's long-settled jurisdictional rules to reflect changing business realities, Congress is fully capable of doing so. It amended the diversity statute in 1958 to provide

that corporations shall be deemed citizens both of the state of their incorporation and the state of their principal place of business. See 28 U.S.C. § 1332(c)(1); Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415. Congress acted again in 1988, when it amended the diversity statute to provide that legal representatives of estates should be deemed to have the same citizenship as the decedent. 28 U.S.C. § 1332(c)(1); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642. As it did in *Carden*, this Court should leave to Congress the task of determining what changes, if any, should be made to the diversity statute in light of contemporary circumstances surrounding business trusts.

Fifth, the Court's precedents include at least one instance in which the Court has looked to the citizenship of trustees even though they were not named as parties to the lawsuit. In *Thomas*, 195 U.S. 207, the respondent (and defendant below) was the Board of Trustees of the Ohio State University, an artificial entity created by state law with the power to sue and be sued in its own name. *Id.* at 213. The trustees themselves were not parties. *Id.* at 208. The Court nonetheless held that the citizenship of the trustees was determinative of the Board's citizenship for purposes of diversity jurisdiction. *Id.* at 218. The Court did not ask whether the Board had beneficiaries, or whether the real party in interest might be deemed to be the citizens of Ohio collectively rather than the trustees. *Thomas* cannot be reconciled with the argument that a federal court should consult the citizenship of trustees for purposes of diversity jurisdiction only when the trustees are parties to litigation in their own names.

E. Important Practical Considerations Confirm the Correctness of Looking to the Citizenship of Trustees Rather than Beneficiaries

For the reasons discussed, the Court's cases and the common law tradition upon which they rely compel the conclusion that the citizenship of trustees rather than beneficiaries controls for purposes of diversity jurisdiction. The significant practical difficulties the Tenth Circuit's contrary approach would entail, compared with the relative simplicity and clarity of the approach outlined here, confirm that reversal is warranted.

This Court repeatedly has emphasized that jurisdictional tests, and specifically those pertaining to the determination of the citizenship of litigants, should be "as simple as possible." *Hertz*, 559 U.S. at 80; see also *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (recognizing the "need for certainty and predictability" in citizenship inquiries); *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (noting that "vague boundar[ies]" are "to be avoided in the area of subject-matter jurisdiction wherever possible"). "Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94.

The Tenth Circuit's rule, if adopted, would be the opposite of simple. Trusts often have hundreds if not thousands of beneficiaries: the business trust at issue in *Navarro* had 9,500. 446 U.S. at 464; see also *Bullard*, 290 U.S. at 189 (noting that trust beneficiaries were "numerous and widely scattered"). It would be an extraordinarily complex, if not impossible, task

in these cases to determine the citizenship of each and every one of the many beneficiaries—many of whose identities are not public information and whose places of residence also are unlikely to be publicly available and are susceptible to frequent change. See *Wilsey v. Eddingfield*, 475 U.S. 1130, 1131 (1986) (White, J., dissenting from denial of certiorari) ("[D]efining diversity jurisdiction by the citizenship of the statutory beneficiaries ... could make for a difficult and time-consuming determination in ascertaining diversity for jurisdictional purposes.").

Similarly, trust beneficiaries often are not precisely defined. Some trusts, such as charitable trusts or public trusts, may not have ascertainable beneficiaries at all, or the beneficiaries may be all members of the public or a very large subset thereof. See Restatement (Third) of Trusts § 28, cmt. c (noting that charitable trusts need not have any "definite or definitely ascertainable beneficiary"); *id.* § 4, cmt. g (noting that trusts such as "public land trusts, school land trusts, or trusts for benefit of native populations[ ] are administered as express trusts"). Even for traditional trusts, the identity of the beneficiaries need not "be known at the time of the creation of the trust" or even exist at that time; the identity must simply become known "within the period and terms of the rule against perpetuities." *Id.* § 44, cmt. a; accord, e.g., *In re Estate of Kessler*, 74 N.W.2d 146, 147 (Wis. 1956). In many cases, that will make it difficult if not impossible to look to the citizenship of the beneficiaries. In other cases, there may be disputes about whether a particular beneficiary's interest has vested or not. Any rule that this Court adopts should be one of general application, despite the many kinds of trusts that exist and the differences in

the nature of their beneficiaries. For a substantial number of trusts, the Tenth Circuit's approach is simply unworkable.

By contrast, as *Navarro* recognized, the "relative simplicity" of the "established principle" of looking to the citizenship of trustees "is one of its virtues." 446 U.S. at 464 n.13. As compared to beneficiaries, trustees generally are few in number and readily identifiable. The Americold Trust has seven trustees. Pet. App. 57. The business trust at issue in *Navarro* had eight. 446 U.S. at 459. The trust at issue in *Bullard* had four. 290 U.S. at 189. Inquiring into the citizenship of that number of individuals is a much more manageable endeavor for the parties and the court in a civil action.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded for a decision on the merits of the ConAgra entities' appeal.

Respectfully submitted,

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No. 14-1382

In The
Supreme Court of the United States

AMERICOLD REALTY TRUST,

Petitioner,

v.

CONAGRA FOODS, INC.,
and SWIFT-ECKRICH, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

In a suit brought against an artificial non-corporate entity, may diversity jurisdiction be measured from a board of managers nominally called trustees or must diversity jurisdiction be measured by aggregating the citizenship of all the entity's members, thus making the artificial entity a citizen of every state in which its members are citizens?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Respondents refer herein to "Petitioners," as Americold Realty Trust and Americold Logistics, LLC jointly filed the *Brief for the Petitioners* before Americold Logistics, LLC was dismissed.

Respondent ConAgra Foods, Inc. and Swift-Eckrich, Inc., pursuant to Rule 29.6, incorporate by reference their corporate disclosure from *Respondents ConAgra Foods, Inc.'s and Swift-Eckrich, Inc.'s Brief in Response to Petition for Writ of Certiorari*.

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STATEMENT OF THE CASE

Lao Tzu said, "Do the difficult things while they are easy and do the great things while they are small. A journey of a thousand miles must begin with a single step." ConAgra, Inc.'s ("ConAgra") and Swift-Eckrich, Inc.'s ("Swift") first step in their thousand-mile journey pursuing over $7 million from Americold Corporation's[1] $25 million insurance policy began in 1992. Americold undeniably owed ConAgra and Swift $7.38 million plus interest and consented to a judgment reflecting that obligation. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 809, 934 P.2d 65, 70 (1997) (*Americold I*); C.A. App. at A279.

Indeed, the Kansas Supreme Court ruled that Americold's $25 million insurance policy covers the precise harm suffered by ConAgra and Swift. *Id.* at 824-26, 934 P.2d at 78-79. In their pursuit of the agreed-to debt and the now-undisputed insurance coverage, ConAgra and Swift have travelled deep into a tangled legal jungle where Americold's insurers have fled, appearing five times before state and federal appellate tribunals. ConAgra and Swift now enter this Court for the sixth appellate hearing to decide whether measuring diversity jurisdiction for

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[1] Americold Realty Trust is the legal successor to Americold Corporation who owned and operated the facility in 1991. Hereafter, Americold Realty Trust, and the predecessor entity Americold Corporation, shall be referred to as "Americold" in that their interests are aligned.

an unincorporated artificial entity must be determined by the titular board of trustees acting as managers, or by the member-shareholders who actually own the artificial entity's beneficial interests.

This journey began on December 28, 1991, when fire raged spreading toxic smoke throughout Americold's 170-acre former underground rock quarry which had been converted to a warehouse. Authorities embargoed the contaminated food, and ConAgra and Swift sued for smoke damages. *Id.* at 812, 934 P.2d at 71. Notably, Americold's lawyers knew that Americold had "serious defense problems," concluding Americold faced disaster at trial. *Id.* at 814, 838, 934 P.2d at 73, 86.

Six weeks before trial, Northwestern Pacific Indemnity Company ("NPIC") first alerted Americold that NPIC claimed there was no coverage asserting a "clean smoke" – "dirty smoke" defense. That is, NPIC insisted its policy excluded coverage for smoke containing toxins, so-called "dirty smoke," but covered only so-called "clean smoke" without toxins, even though NPIC failed to explain how any fire produced "clean smoke." *Id.* at 825, 934 P.2d at 78. In other words, hostile fires don't emit "clean smoke," and Americold indignantly claimed the defense was specious demanding coverage. *Id.* at 818, 934 P.2d at 75. But NPIC refused to offer any of its $25 million policy limits to settle, hunkering down with its "clean smoke" – "dirty smoke" defense.

On March 10, 1994, the Tenant Plaintiffs[2] and Americold settled (the "Agreement"), whereby Americold consented to judgments for the Tenant Plaintiffs who agreed to only execute on Americold's insurance contracts. *See* C.A. App. at A246. So, Americold assigned claims against NPIC and TIG Insurance Company ("TIG") and also agreed to cooperate by signing additional documents to effectuate the Agreement's purpose or collect the Consent Judgments. *See* C.A. App. at A246, A262. In September 1994, the Tenant Plaintiffs garnished NPIC and TIG (the "Garnishment Action"), but both insisted their policies excluded coverage. *See* C.A. App. at A247. The trial judge granted summary judgment against both, finding coverage and awarding $58,670,754 collectively to the Tenant Plaintiffs. *Americold I*, 261 Kan. at 820, 934 P.2d at 76. TIG then paid its $15 million policy limits, but NPIC appealed.

The *Americold I* court saw through NPIC's "clean smoke" – "dirty smoke" defense and flatly rejected it, finding NPIC breached the insurance contract but nevertheless remanded the case directing that the trial judge answer the following: (1) were the Consent Judgments reasonable, and (2) did NPIC deny coverage in bad faith. *Id.* at 810, 853, 934 P.2d at 71, 93-94. *Americold I* left undisputed NPIC's liability for its

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[2] Tenant Plaintiffs are those plaintiffs suing Americold under lease arrangements, not other plaintiffs who sued on bailment claims.

$25 million policy limits for smoke damage. *Id.* at 853, 934 P.2d at 94.

After the Garnishment Action remand, Judge Sieve heard a ten-week trial deciding the settlement's reasonableness and NPIC's bad faith. Under the Agreement's cooperation provisions, Americold executives testified concerning both issues. *See* C.A. App. at A139-A238. On November 15, 2005, the trial's last day, NPIC moved to dismiss claiming for the first time that the Tenant Plaintiffs didn't file new executions during the Garnishment Action's pendency leaving the Consent Judgments dormant. *See* C.A. App. at A247; J.A. at 31. Judge Sieve, who had to sign the executions NPIC now claimed were necessary to sustain the Consent Judgments, concluded he lacked such authority until he fulfilled the *Americold I* mandate by determining the Consent Judgments' reasonableness and thus enforceability. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 293 Kan. 633, 642, 270 P.3d 1074, 1080 (2011) (*Americold III*[3]). Judge Sieve denied NPIC's motion, *see* C.A. App. at A247, and then determined that NPIC asserted its "clean-smoke" – "dirty-smoke" defense in bad faith as a belated effort to avoid coverage. C.A. App. at A571-A572. Judge Sieve entered judgment on ConAgra's

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[3] *Americold II* involved NPIC's appeal to the Kansas Supreme Court seeking reversal of a ruling disqualifying one of the four law firms NPIC hired to defend itself. *See Associated Wholesale Grocers, Inc. v. Americold Corp.*, 266 Kan. 1047, 1047, 975 P.2d 231, 232 (1999).

and Swift's separate claim that their Consent Judgment was reasonable awarding $11,987,489.52 plus attorneys' fees and expenses. *See* C.A. App. at A247, A290-A291. ConAgra's and Swift's award fell within *Americold I*'s determination that $25 million was available to pay claims.

NPIC appealed, and on December 23, 2011, over 14 years after *Americold I* and nearly six years after Judge Sieve tried the Garnishment Action, the Kansas Supreme Court in *Americold III* reversed, finding the Consent Judgments dormant. The judgments against NPIC were vacated, and the Garnishment Action dismissed without prejudice. *See* C.A. App. at A248.

The Tenant Plaintiffs then demanded that Americold execute stipulations to revive the judgments, *see* C.A. App. at A248, and without explanation, Americold refused. The Tenant Plaintiffs sued in state court, *see* C.A. App. at A9, claiming that Americold breached the Agreement's cooperation obligations by refusing to sign the additional documents to "effectuate the Agreement's purpose" and "pursue the assigned claims" permitting collection under NPIC's undisputed insurance coverage. *See* C.A. App. at A20-A21. Americold then removed claiming diversity jurisdiction as a Maryland Real Estate Investment Trust ("REIT"). J.A. at 8-11.

When Americold embraced NPIC's cause by refusing to cooperate, ConAgra and Swift were dumbfounded. Under the Agreement, Americold faced no

liability for such perfunctory acts; yet Americold joined NPIC's tactical battle spending hundreds of thousands of dollars fighting a conflict in which Americold had no stake. Ironically, Americold agrees it owed the money and consented to judgments, C.A. App. A246, knows that the Kansas Supreme Court ruled the $25 million NPIC policy covered the precise smoke damage suffered by ConAgra and Swift, *Americold I*, 261 Kan. at 824-26, 934 P.2d at 78-79, and knows the Agreement's purpose included ensuring NPIC's efforts not be rewarded by escaping scot-free after providing $25 million to cover the precise losses sustained by ConAgra and Swift. Consenting to the stipulation furthers that purpose because Americold, ConAgra, and Swift never intended for NPIC to secure a $25 million windfall from its bad faith coverage denial and delay tactics.

The district court ultimately granted Americold's motion for summary judgment ruling that *Americold III* foreclosed any ability to revive the judgments. ConAgra and Swift appealed, and while on appeal, the Tenth Circuit raised jurisdictional issues and requested briefing. Pet. App. at 21-22. Both the jurisdictional questions and the merits of the district court's summary judgment were argued before the court, but the Tenth Circuit never reached a decision on ConAgra's and Swift's claims that the district court erred in granting summary judgment, only ruling that the district court had no jurisdiction to decide the case. The Tenth Circuit concluded that because Americold's beneficiary-shareholders were

undeniably citizens of the same states as the Tenant Plaintiffs, diversity failed. *ConAgra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1182 (10th Cir.), *as amended* (Jan. 27, 2015), *cert. granted*, 136 S. Ct. 27 (2015).

SUMMARY OF THE ARGUMENT

This case presents the straightforward question of whether to measure a state law artificial entity's citizenship for diversity by its beneficial owners or a titular board of managers. The answer is equally straightforward – under this Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), that citizenship is measured by the entity's beneficial members, here nominally called shareholders under Maryland law.

Indeed, diversity jurisdiction invoked through non-corporate juridical entities – entities possessing capacity to sue and be sued under state law – must be established by measuring citizenship through all the entities' members. Maryland REITs which choose to be "an unincorporated business trust or association" and not a "corporation" possess juridical-person status with capacity to sue or be sued. Maryland REITs choosing unincorporated status must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

Indeed, this Court has "often had to consider the status of artificial entities created by state law

insofar as that bears upon the existence of federal diversity jurisdiction." *Carden*, 494 U.S. at 187 Corporations are citizens where incorporated and principally doing business. *E.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); 28 U.S.C. § 1332(c)(1). All other unincorporated artificial entities are citizens of every state where their members are citizens. *E.g.*, *Carden*, 494 U.S. at 189-91. The Court decidedly concluded that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have just as firmly resisted extending that treatment to other entities." *Id.* at 189.

Here, Maryland REITs are either a corporation on one side of the doctrinal wall or an unincorporated entity or association on the other. *See id.* Indeed, a Maryland REIT may choose to be a "corporation" or an unincorporated association. *Brief for the National Association of Real Estate Investment Trusts as* Amicus Curiae *Supporting Reversal* ("NAREIT Brief") at 4 n.2, 16-17. Notably, Americold chose to be an unincorporated association under Maryland statutes. Pet. App. at 58-59; Md. Code Ann., Corps. & Ass'ns § 8-101(c).

Naturally, under Maryland law, Americold is a "separate legal entity"; *i.e.*, an "unincorporated business trust or association." Md. Code Ann., Corps. & Ass'ns § 8-102. Americold can "[s]ue, be sued, complain, and defend in all courts" in its own name. § 8-301(2); Pet. App. at 59. As a non-corporate artificial entity, Americold cannot breach the "doctrinal wall of *Chapman v. Barney*" reaffirmed in *Carden* to claim

citizenship in its own right. Remarkably, Petitioners plainly admit that "no party contends that a trust should be treated as a citizen in its own right." *Brief for the Petitioners* at 21.

Indeed, most common law trust estates decidedly possess no capacity to sue or be sued, lacking a distinct legal identity, but rather comprise estates embedded with common law fiduciary duties and contract rights necessary to administer property. *See Brief of Winston Wen-Young Wong as* Amicus Curiae *in Support of Petitioners* ("Dr. Wong Brief") at 13-14 (quoting RESTATEMENT (THIRD) OF TRUSTS § 2 and 76 AM. JUR. 2d *Trusts* § 3). Thus, as *Carden* notes, trust estates lack juridical-person status. 494 U.S. at 194 (*Navarro* "involved not a juridical person but the distinctive common-law institution of trustees"). So, Maryland REITs created under state statute as unincorporated associations granted juridical-entity status naturally can't be common law trusts which lack the capacity to sue or be sued.

And, this Court decidedly left no doubt that unincorporated artificial entity "members" include, at minimum, all of the entity's beneficial owners. Of course, both general and limited partnerships include all partners as "members." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 569 (2004) (citing "the accepted rule that . a partnership . . is a citizen of each State or foreign country of which any of its partners is a citizen" (citing *Carden*, 494 U.S. at 192-95)). Similarly, limited liability companies aggregate each member's (*i.e.*, owner's) citizenship for diversity

purposes. *See id.* at 586 n.1 (Ginsburg, J., dissenting) ("Although the Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes." (citing *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004) and *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

Yet, Americold strains credulity insisting that because common law trust beneficiaries aren't liable for the trustee's or trust estate's obligations, and likewise Maryland statutory REIT shareholders aren't liable for the REIT's or its managers' obligations, that the common law trust and statutory REIT must be synonymous. *See Brief for the Petitioners* at 8-9, 17-19. Just because common law beneficiaries can't be sued for the trust estate's obligations or trustees' actions and Maryland REIT "shareholders" can't be sued for the REIT's or its managers' actions doesn't morph the beneficiaries and shareholders into the same thing in all respects. Indeed, there are countless legal relationships where one party possesses no responsibility to answer for another and that common characteristic in no way makes those persons the same in all respects. A few simple examples sufficiently sharpen the point.

For instance, limited partners, limited liability company members, and corporation stockholders traditionally possess no liability for the artificial entities' or their managers' conduct. *See* Kan. Stat. Ann. § 56-1a203(a) (generally "a limited partner is

not liable for the obligations of a limited partnership"); Kan. Stat. Ann. § 17-7688(a) (members and managers of LLC not liable for LLC obligations); *Coles v. Taliaferro*, 251 Kan. 648, 655, 840 P.2d 1102, 1106 (1992) ("Generally, debts of a corporation are not the individual indebtedness of its stockholders."). If we apply Americold's no-liability-for-beneficiaries-and-shareholders thesis to limited partners, limited liability company members, and corporation stockholders, then won't all be treated like common law trust beneficiaries because they possess no liability for the entities' or their managers' actions? As such, doesn't Americold's thesis lead to the conclusion that limited liability companies, limited partnerships, and corporations must be treated like common law trusts, measuring diversity citizenship by their managers? Answering the question indicts the proposition, and such an untenable conclusion requires the Court to ignore *Carden* because it rejected this identical argument. *See* 494 U.S. at 195-96.

Instead, Maryland REIT shareholders are virtually identical to limited partners and LLC members in that all three invest capital in artificial entities and own beneficial, transferrable entity interests without personal responsibility for the entities' or their managers' liabilities. The beneficial owners' limited liability provides no guidance in determining the entities' citizenship. Likewise, only looking to REIT managers, nominally called trustees, to determine citizenship "finds even less support" because this Court has "never held that an artificial entity,

suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members." *Id.* at 192.

Here, Americold's "membership" for diversity purposes includes all of its owners, denominated as "shareholders" under Maryland law. Under Americold's Trust Declaration and Maryland REIT statutes, "beneficial interest[s]" in Americold are represented by "shares." Pet. App. at 64; *see also* Md. Code Ann., Corps. & Ass'ns § 8-101(d). As beneficial interest owners, Americold's "shareholders" are its "members." *See Carden*, 494 U.S. at 189-97.

Finally, if Americold's citizenship is determined by the trustees' citizenship as urged, Americold failed to establish diversity jurisdiction. Flawed diversity jurisdiction invalidates any final judgment where indispensable parties are not completely diverse at the time judgment is entered. Here, the Americold trustees never established complete diversity between themselves and the Tenant Plaintiffs at the time judgment was entered. That is, at removal, Americold trustees were citizens of California and Massachusetts. *See* Pet. App. at 51. And, on the other side of the diversity ledger, Plaintiffs Safeway, Inc. ("Safeway") and Hanover, Inc. ("Hanover") were also California and Massachusetts citizens. J.A. at 23. This diversity defect remained "[un]cured" – it "lingered through judgment." *Cf. Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996). Naturally, this requires

remand even if the Americold trustees' citizenship is determinative for diversity purposes.

ARGUMENT

I. Diversity jurisdiction invoked through non-corporate juridical entities – entities possessing capacity to sue and be sued under state law – must be established by measuring citizenship through all the entities' members. Maryland REITs which choose to be "an unincorporated business trust or association" and not a "corporation" possess juridical-person status with capacity to sue or be sued. Maryland REITs choosing unincorporated status must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

ConAgra and Swift agree with Petitioners that diversity jurisdiction is based upon Article III of the Constitution; the Judiciary Act of 1789, enacted by the First Congress, vested lower federal courts with jurisdiction where a "suit is between a citizen of the State where the suit is brought and a citizen of another State"; and that the diversity statute has been amended over time, but remains substantively unchanged at its core – requiring a threshold amount in controversy and diverse citizenship. *See Brief for the Petitioners* at 11-12. That's where any agreement ends, and Americold's failure to confront its

non-corporate juridical-entity status under Maryland law dooms its cause to reverse the Tenth Circuit's decision.

First, this Court has "often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990). Any artificial entity party seeking to invoke diversity jurisdiction must show the parties have capacity to sue or be sued and are diverse. Fed. R. Civ. P. 17; 28 U.S.C. § 1332. Notably, courts only recognize juridical entities as those with the capacity to sue or be sued under state law. *See, e.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 266 (1992) ("The presence of [power to sue or be sued] language . . . merely establishes that the Red Cross is a juridical person which may be party to a lawsuit in an American court. . ."); *see also Carden*, 494 U.S. at 194 (noting that *Chapman*, *Great Southern*, and *Bouligny* "did involve juridical persons").

Second, the Court has erected a rigid structure for determining citizenship under 28 U.S.C. § 1332, and this case presents no justification for destroying it and erecting a new one. Natural persons' citizenship is measured by their state of domicile. *E.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006); *Gilbert v. David*, 235 U.S. 561, 569 (1915). Corporations are citizens where incorporated and principally doing business. *E.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005); 28 U.S.C. § 1332(c)(1). All other unincorporated artificial entities are citizens of every

state where their members are citizens. *E.g.*, *Carden*, 494 U.S. at 189-91. The Court decidedly concluded that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . just as firmly resisted extending that treatment to other entities." *Id.* at 189.

Third, as recognized by *Amicus* Dr. Wong, *Carden* doesn't extend beyond associations that have no separate state law artificial existence largely because any such action by federal courts recognizing artificial entities without regard to, or even despite, a governing state's refusal to do so offends Rule 17(b) of the Federal Rules of Civil Procedure and the Rules Enabling Act. Dr. Wong Brief at 29. More significantly, such actions offend the Constitution and the system of federalism on which our government was founded. Important characteristics such as the legal existence and the ability to own property are substantive matters. *See Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 77 (1944) (Frankfurter, J., concurring) (entity's "status" is a "substantive issue"); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 604 (1974) ("[T]he definition of property rights is a matter of state law."). Federal courts must look to state substantive law regarding an artificial entity's separate legal existence and ability to hold property insofar as they bear on diversity jurisdiction.

Notably, non-corporate artificial juridical entities – entities possessing capacity to sue or be sued under state law – must satisfy diversity requirements before federal courts may exercise subject

matter jurisdiction.[4] That is, to invoke diversity jurisdiction, the pleadings must show that entities named as parties possess capacity to sue or be sued as juridical entities and facts demonstrating such parties' citizenship. *See, e.g.*, *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("The party who seeks the exercise of jurisdiction . must allege in his pleading the facts essential to show jurisdiction."); *see also Hillsborough Twp., Somerset Cty., N.J. v. Cromwell*, 326 U.S. 620, 626 (1946) ("[T]he jurisdiction of the District Court is determined by the allegations of the bill. . . ."); Fed. R. Civ. P. 9(a)(1); *cf. Mallory & Evans Contractors & Engineers, LLC v. Tuskegee Univ.*, 663 F.3d 1304, 1305 (11th Cir. 2011) (finding court lacked jurisdiction where complaint failed to allege citizenship of LLC members and university). Stated another way, only where artificial entity parties under state law invoke diversity jurisdiction will the entity-parties' citizenship be significant.

Just as importantly, diversity jurisdiction determinations should be "as self-regulated as breathing," *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (quoting Currie, *The Federal Courts and the*

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[4] This Court recognizes, however, that associations not granted juridical status under state law nevertheless may be juridical entities and proper parties to a suit only when a substantive right existing under the United States Constitution or laws is at issue. *See United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 388-89 (1922); Fed R. Civ. P. 17(b)(3)(A).

American Law Institute, Part I, 36 U. CHI. L. REV 1 (1968)), and in confirming an artificial entity's invocation of diversity jurisdiction, "[c]apacity to sue or be sued is determined . for all [non-individual non-corporate] parties, by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). Stated differently, federal courts look to state law grants of capacity to sue or be sued upon various unincorporated entities and associations when determining their federal diversity jurisdiction. *See, e.g.*, *Carden*, 494 U.S. at 187 (noting federal courts consider artificial entity status under state law insofar as it bears on diversity jurisdiction).

Indeed, this Court has looked to state law capacity to sue and be sued granted to artificial entities invoking diversity jurisdiction on several occasions when measuring the citizenship of those artificial entities. *See, e.g.*, *Carden*, 494 U.S. at 194 (Arizona limited partnership); *United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965) (labor union[5]); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454 (1900) (Pennsylvania limited partnership association); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (New York joint stock company).

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[5] Arguably the Court in *Bouligny* expressed doubt that labor unions were juridical persons. 382 U.S. at 153 (refusing to treat unions as corporations for diversity purposes but noting "widespread support for the recognition of labor unions as juridical personalities"). But *Carden* expressly states that *Bouligny* "did involve [a] juridical person[ ]." 494 U.S. at 194.

So, to invoke diversity jurisdiction, a state law non-corporate juridical entity must plead facts demonstrating capacity to sue or be sued and its aggregate citizenship to meet such diversity requirements. *E.g.*, *Geer v. Cox*, 242 F. Supp. 2d 1009, 1025 (D. Kan. 2003); R. 9(a)(1). That is, it must plead the citizenship of all its members demonstrating the Court's subject matter jurisdiction. *See, e.g.*, *Carden*, 494 U.S. at 194.

Here, Maryland grants REITs like Americold non-corporate juridical-entity status with the capacity to sue or be sued. *See* Md. Code Ann., Corps. & Ass'ns § 8-301(2). So, Maryland REITs as non-corporate juridical entities under state law seeking to invoke diversity jurisdiction must plead the bases upon which they invoke such jurisdiction including their members-shareholders' citizenship. By plainly showing the bases for diversity, the lower courts' diversity determination is "as self-regulated as breathing."

Under this bifurcating doctrinal wall segregating corporations from all other non-corporate artificial entities with capacity to sue or be sued, Americold chose to be a non-corporate Maryland REIT, requiring Americold to plainly show the bases for diversity jurisdiction by aggregating the citizenship of all its member-shareholders. This Court pronounced the wall impenetrable, and Americold articulates no forceful bases upon which to breach it by overlooking its failure to plainly establish diversity jurisdiction.

A. Unincorporated juridical entities who by definition are not natural persons or corporations must measure citizenship by aggregating all their members' citizenship. Maryland REITs which choose to be "an unincorporated business trust or association" must measure citizenship by aggregating all their members' citizenship under 28 U.S.C. § 1332.

The Court's rigid "doctrinal wall" between corporations and all other unincorporated juridical entities provides a transparent framework to determine an artificial entity's citizenship for diversity purposes. *See Carden*, 494 U.S. at 189-90. *First*, as stated, corporations are citizens where incorporated (and, pursuant to 28 U.S.C. § 1332(c)(1), where principally doing business); unincorporated entities are citizens of every state of which their members are citizens. *Carden*, 494 U.S. at 188-89, 195-96. This rule "depends on the citizenship of 'all the members,' . . 'the several persons composing such association,' [and] . . 'each of its members.'" *Id.* at 195-96 (finding all partners – limited and general – must be considered for diversity purposes) (quoting *Chapman*, 129 U.S. at 682; *Great Southern*, 177 U.S. at 456; and *Bouligny*, 382 U.S. at 146).

Here, Maryland REITs are either a corporation on one side of the doctrinal wall or an unincorporated entity or association on the other. *See Carden*, 494 U.S. at 188-92. Indeed, a Maryland REIT may choose

to be a "corporation" or an unincorporated association. NAREIT Brief at 4 n.2, 16-17 Maryland REITs choosing non-corporate status have the capacity to sue or be sued under state law and therefore are juridical entities. Md. Code Ann., Corps. & Ass'ns § 8-301(2); *see also* § 8-102(2); *Red Cross*, 505 U.S. at 266. Notably, Americold chose to be an unincorporated association under Maryland statutes which provide:

> "Real estate investment trust" means an unincorporated business trust or association formed under this title in which property is acquired, held, managed, administered, controlled, invested, or disposed of for the benefit and profit of any person who may become a shareholder.

Md. Code Ann., Corps. & Ass'ns § 8-101(c).

Under Maryland law, Americold is a "separate legal entity"; *i.e.*, an "unincorporated business trust or association." § 8-102. Americold can "[s]ue, be sued, complain, and defend in all courts" in its own name. § 8-301(2); Pet. App. at 59. As a non-corporate artificial entity, Americold cannot breach the "doctrinal wall of *Chapman v. Barney*" reaffirmed in *Carden* to claim citizenship in its own right. Remarkably, Petitioners plainly admit that "no party contends that a trust should be treated as a citizen in its own right." *Brief for the Petitioners* at 21.

Not surprisingly, both *amicus* briefs readily acknowledge Americold's artificial-juridical-entity status under state law. *Amicus* National Association

of Real Estate Investment Trusts ("NAREIT") urges that a Maryland REIT is a "separate 'juridical person'; created by state law and given its own 'birth certificate'; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board." NAREIT Brief at 11. *Amicus* Dr. Wong agrees. Dr. Wong Brief at 6-17.

Second, most common law trust estates decidedly possess no capacity to sue or be sued, lacking a distinct legal identity, but rather comprise estates embedded with common law fiduciary duties and contract rights necessary to administer property. *See* Dr. Wong Brief at 13-14 (quoting RESTATEMENT (THIRD) OF TRUSTS § 2 and 76 AM. JUR. 2d *Trusts* § 3). Thus, as *Carden* notes, trust estates lack juridical-person status. 494 U.S. at 194 (*Navarro* "involved not a juridical person but the distinctive common-law institution of trustees"); *cf. Neonatal Prod. Grp., Inc. v. Shields*, No. 13-CV-2601-DDC-KGS, 2014 WL 6685477, at *4 n.1 (D. Kan. Nov. 26, 2014) ("The trustees of a trust, not the trust itself, are the proper defendants in a suit against a trust.").

But, the common law's refusal to recognize trusts as juridical entities lacks the necessary elasticity to stretch it beyond recognition by applying it to dissimilar circumstances. That is, common law trusts' incapacity to sue or be sued can't be stretched far enough to undermine a statutory REIT's express grant of artificial-entity status with such rights to sue or be sued. And, where state law grants juridical-entity status to relationships only formerly recognized

under common law, those newly-created juridical entities nevertheless possess artificial-entity status. For instance, if a state grants common law trusts the capacity to sue or be sued in the same way states granted common law partnerships the capacity to sue and be sued, *e.g.*, Unif. P'ship Act § 307 (1997), then such trusts become juridical persons under state law and a proper artificial entity party under Rule 17(b). Some states have granted what was formerly a traditional common law charitable trust estate such capacity to sue and be sued under state law. *See, e.g.*, Unif. Statutory Trust Entity Act §§ 201, 302; Ky. Rev. Stat. Ann. § 386A.1-010 *et seq.*; Del. Code Ann. tit. 12, § 3801 *et seq.* Obviously, when any former state law trust estate is now granted artificial-entity status and seeks to invoke diversity jurisdiction in federal courts, these newly-created juridical entities' citizenship must be measured by aggregating all of their beneficial owners' citizenship under *Carden*.

So, Maryland REITs created under state statute as unincorporated associations granted juridical-entity status naturally can't be common law trusts which lack the capacity to sue or be sued. Frankly stated, common law trusts possess no juridical-entity status making them instinctively different than REIT associations which may choose artificial entity unincorporated status. Under *Carden*, such entities must measure citizenship by aggregating all the REITs' members' citizenship.

B. Non-corporate juridical entities' "members" for diversity purposes include those persons holding a beneficial and/or economic interest. A Maryland REIT is a non-corporate juridical entity with member-shareholders possessing beneficial and/or economic interests. A Maryland REIT's "members" for diversity purposes include each of its shareholders.

1. Holders of beneficial and/or economic interests are the "members" of non-corporate juridical entities. Shareholders are the holders of the beneficial and/or economic interests in Maryland REITs, and so are its "members."

This Court has "oft [] repeated" the rule that diversity jurisdiction in a suit by or against an unincorporated, artificial entity depends on the citizenship of "all the members." *Carden*, 494 U.S. at 195-96. *Carden*'s framework squarely applies here. *Id.*

First, this Court decidedly left no doubt that unincorporated artificial entity "members" include, at minimum, all of the entity's beneficial owners. Indeed, both general and limited partnerships include all partners as "members." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 569 (2004) (citing "the accepted rule that . . . a partnership . . . is a citizen of each State or foreign country of which any of its partners is a citizen" (citing *Carden*, 494 U.S. at

192-95)). Similarly, limited liability companies aggregate each member's (*i.e.*, owner's) citizenship for diversity purposes. *See id.* at 586 n.1 (Ginsburg, J., dissenting) ("Although the Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes." (citing *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004) and *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998)).

Yet, Americold strains credulity insisting that because common law trust beneficiaries aren't liable for the trustee's or trust estate's obligations and likewise Maryland statutory REIT shareholders aren't liable for the REIT's or its managers' obligations, that the common law trust and statutory REIT must be synonymous. *See Brief for the Petitioners* at 8-9, 17-19. Just because common law beneficiaries can't be sued for the trust estate's obligations or trustees' actions and that Maryland REIT "shareholders" can't be sued for the REIT's or its managers' actions doesn't morph the beneficiaries and shareholders into the same thing in all respects. Indeed, there are countless legal relationships where one party possesses no responsibility to answer for another and that common characteristic in no way makes those persons the same in all respects. A few simple examples sufficiently sharpen the point.

For instance, limited partners, limited liability company members, and corporation stockholders traditionally possess no liability for the artificial

entities' or their managers' conduct. *See* Kan. Stat. Ann. § 56-1a203(a) (generally "a limited partner is not liable for the obligations of a limited partnership"); Kan. Stat. Ann. § 17-7688(a) (members and managers of LLC not liable for LLC obligations); *Coles v. Taliaferro*, 251 Kan. 648, 655, 840 P.2d 1102, 1106 (1992) ("Generally, debts of a corporation are not the individual indebtedness of its stockholders."). So, peeking behind the curtain of Americold's position shows the Wizard feverishly pulling levers discharging distractions hoping to avoid the obvious question: If we apply Americold's no-liability-for-beneficiaries-and-shareholders thesis to limited partners, limited liability company members, and corporation stockholders, then won't all be treated like common law trust beneficiaries because they possess no liability for the entities' or its managers' actions? As such, doesn't Americold's thesis lead to the conclusion that limited liability companies, limited partnerships, and corporations must be treated like common law trusts, measuring diversity citizenship by their managers? Naturally, answering the question indicts the proposition, and such an untenable conclusion requires the Court to ignore *Carden* because it rejected this identical argument. *See* 494 U.S. at 195-96.

Notably, Americold's similarly unfounded insistence that artificial entities called Real Estate Investment Trusts and common law fiduciary relationships called "trusts" must be the same thing

because they both use the word "trust" lacks weightiness.[6] Simply put, it's as thin as a toothpick because surely using a similar word to label two distinct things does not make them the same thing in every way. Of course, calling a smart car and a Hummer "automobiles" doesn't make them the same in all respects, and naturally you wouldn't take a smart car on an off-road mountainous hunting trip, nor try to parallel park a Hummer in a space where only a motorcycle or smart car can fit. They obviously are not the same in all respects, and are instinctively and decidedly different under specific circumstances. Americold's insistence that common law beneficiaries and Maryland REIT shareholders are positionally identical for diversity purposes because they share the moniker "trust" ignores the decided and instinctive differences between common law trusts and Maryland REIT associations.

Instead, Maryland REIT shareholders are virtually identical to limited partners and LLC members in that all three invest capital in artificial entities and own beneficial, transferrable entity interests without personal responsibility for the entities' or their managers' liabilities. The beneficial owners' limited liability provides no guidance in determining

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[6] *Amicus* NAREIT agrees: "Petitioner is not just any trust. [I]t is an entity organized under [the Maryland REIT statute]. Its citizenship should therefore turn on the characteristics of a Maryland Trust REIT, not on the general label 'trust.'" NAREIT Brief at 11.

the entities' citizenship. Likewise, only looking to REIT managers, nominally called trustees, to determine citizenship "finds even less support" because this Court has "never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members." *Carden*, 494 U.S. at 192.

Third, common law trusts lacking artificial-entity status invoke unique traditions unmistakably distinct from state law artificial entities. For instance, common law trust settlors traditionally contribute the *res* in the form of a gift for the beneficiaries. *E.g.*, *Taliaferro v. Taliaferro*, 260 Kan. 573, 578, 921 P.2d 803, 808 (1996); *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002). For the statutory entities at issue here and in *Carden*, the investors make no gift benefiting others. Besides, common law beneficiaries typically don't buy and sell interests in the donated *res*, and yet investors typically buy and sell interests in REITs, limited partnerships, or limited liability companies. Assuredly, Americold's oblique insistence that Maryland REIT shareholders are positionally equal to common law trust beneficiaries is an ungainly distraction at best.

Here, Americold's "membership" for diversity purposes includes all of its owners, denominated as "shareholders" under Maryland law. Under Americold's Trust Declaration and Maryland REIT

statutes, "beneficial interest[s]" in Americold are represented by "shares." Pet. App. at 64; *see also* Md. Code Ann., Corps. & Ass'ns § 8-101(d). As beneficial interest owners, Americold's "shareholders" are its "members." *See Carden*, 494 U.S. at 189-97.

2. Maryland REIT trustees hold no beneficial and/or economic interests as trustees and as such are not "members." Maryland REIT boards of trustees act similarly to LLC boards of managers.

Petitioners erroneously urge that Americold's beneficial owners must be ignored in determining Americold's "members," and instead claim "[t]he members of an unincorporated association are those persons who would have been liable at common law for the artificial entity's obligations." *Brief for the Petitioners* at 23. As set out above, turning a blind eye to the Court's doctrinal wall will lead only to treating REITs, limited partnerships, limited liability companies, and corporations alike; and decidedly turns the Court's doctrinal wall into a doctrinal speed bump. Americold's efforts to chisel down the wall are unavailing.

First, Americold roots its lack-of-common-law-liability analogy in "several nineteenth century cases" which Americold insists "draw [a] parallel between trustees and members of unincorporated associations" based on similar capacities to sue or be sued. *Brief for the Petitioners* at 25-26. These cases provide

no fertile ground for Americold, but instead have nothing to do with measuring diversity jurisdiction for non-corporate artificial entities (Americold cites only state court cases). *See id.* Americold's nineteenth century cases involve only non-juridical, unincorporated common law trusts or associations without capacity to sue or be sued under state law. This extended common law trustees' capacity to sue or be sued discussion clings almost exclusively to inapposite cases discussing non-juridical, common law trusts having nothing to do with Maryland REITs created as juridical entities. *See, e.g., Brief for the Petitioners* at 12.

At best, Americold's cases only reaffirm common law trustees' ability, under certain circumstances, to sue or be sued – without naming the beneficial interest holders in the *res*.[7] But, the cases nowhere suggest

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[7] *Brief for the Petitioners* at 25-26 (citing *Laughlin v. Greene*, 14 Iowa 92, 94 (1862) (holding action properly brought by trustee of an unincorporated "trust company," and the action should not have been asserted in the name of the "trust company" because it possessed no power to "sue and be sued in that name"); and *Bryan v. Stevens*, 4 F. Cas. 510, 511 (C.C.S.D.N.Y. 1841) (plaintiffs holding patent rights "in trust" properly brought action in their own names without naming all persons with beneficial interest in trust property); and *Thomas v. Dakin*, 22 Wend. 9, 34-35 (N.Y. Sup. Ct. 1839) (recognizing unincorporated associations cannot "sue or be sued in its assumed name," but "[the court] recognizes individuals, who claim to be heard in their own right, or as trustees for others")). Americold similarly cites *Weaver v. Trustees of Wabash & E. Canal*, 28 Ind. 112, 120 (1867); *Trustees of the Methodist Episcopal Protestant Church at Jefferson v. Adams*, 4 Or. 76, 88 (1870); *Kuhl v. Meyer*, 35 Mo.

(Continued on following page)

that a trustee's capacity to sue or be sued morphed the trust into a juridical entity and the trustees' into the entity's sole "members." In other words, Americold's relied-upon authorities involving common law trustees' capacity to sue or be sued provide no guidance in determining a juridical entity's "membership."

Second, there is no serious argument that Americold is a "traditional trust," but only an artificial juridical entity controlled by *Carden*. Americold repeatedly refuses to confront its status as a non-corporate juridical entity under Maryland law. Indeed, both *amici* agree that Americold possesses juridical-entity status. *See, e.g.*, Dr. Wong Brief at 4 ("Should the Court . . . determine that diversity jurisdiction in the case at bar depends on the citizenship of the beneficiaries of Americold, the Court should expressly limit its holding to the specific type of trust at issue in this case, *i.e.*, a statutory business trust that is a legal entity under state law. The Court should distinguish between a statutory trust that is a legal entity under state law and a traditional trust, which is not. "); *see also, e.g.*, NAREIT Brief at 21-22 ("Significantly, however, the Maryland Trust REIT is *not* a common-law entity, nor even – unlike the limited partnership in *Carden* – a statutory modification of a common law entity. . . . [N]otwithstanding the word 'trust' in its name, the Maryland Trust REIT is entirely a creature of statute."). And, Americold

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App. 206, 211 (1889); and *Hecker v. Cook*, 20 Colo. App. 282, 78 P. 311 (1904) for the same proposition.

understandably offers no contrary authority that courts ignore a juridical entity's beneficial owners in determining that entity's "membership" for diversity purposes, obviously because this Court expressly rejected an identical argument in *Carden*.

Decidedly, *Carden* expressly rejected any argument importing a "real party to the controversy test" to "the quite different question of how the citizenship of [a] single artificial entity is to be determined." 494 U.S. at 188 n.1. Such a "real party to the controversy test" resting on "control" over the unincorporated association, the Court held, has "played no part in our decisions" determining an artificial, juridical entity's citizenship:

> This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization (for which one could at least point to *Russell*). We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.

Id. at 192.

Americold nevertheless trots out the same old "real party to the controversy test" urged and rejected in *Carden*. Yet, *Carden* makes clear an artificial entity's "membership" must not be measured by "control," but must be determined by aggregating all the entity's beneficial owners' citizenship. Here, like *Carden*'s limited partners, Americold's "shareholders" own the artificial entity named as a party. They are Americold's "members."

Third, this Court's decision in *Navarro* presents no exception to this structure and fits squarely within its framework. *See* 446 U.S. at 465-66. That is, the *Navarro* decision shows that if parties to the controversy are natural persons serving as trustees, suing as natural persons to collect notes payable to themselves, and possessing capacity to sue or be sued under state law, then diversity is measured by those natural persons' citizenship. *Id.* at 459. So, natural persons properly named as parties suing in their own name, properly before the court, requires only looking to those natural persons' citizenship.

Indeed, both circuits that substantively peered into state law artificial entities merely labelled "trusts" ruled that the entities' members included, at a minimum, their beneficial owners by which citizenship must be measured. *See ConAgra Foods*, 776 F.3d at 1181; *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1338-40 (11th Cir. 2002) (holding a trust's citizenship is determined by reference to the beneficiaries), *overruled in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith*

Inc. v. Dabit, 547 U.S. 71 (2006). Here, Americold chose to be a state law association merely labelled a trust, which naturally leads to the conclusion that its shareholders constitute its members.

C. Americold's line-blurring assertions urge this Court to now measure non-corporate juridical entities by a titular board of managers instead of its members, leading only to confusion and extensive threshold litigation for lower courts.

Americold's urgings to reverse the Tenth Circuit by measuring an artificial entity's citizenship by a titular board of managers falls flat for several reasons, but just as importantly, if adopted only leads to confusion and extensive threshold litigation. *First*, Americold refuses to confront that it is not a "traditional" common law express trust, and as such, Americold blindly urges an ill-fitted rule with no applicability to Maryland REITs. *See Brief for the Petitioners* at 11-19. Like a man wearing an ill-fitted suit much too small for his lanky configuration, Americold insists on outfitting Maryland REITs with a suit too small – the sleeves and pant legs are too short, leaving only an oafish appearance.

Nevertheless, Americold stretches as far as possible this ill-fitted assertion, urging that this Court must ignore the REITs' beneficial shareholders and only look to the titular board of managers called trustees. Initially, as set out above, Americold

erroneously insists that REIT managers are the same as common law trustees. *Id.* at 12. Americold then doubles down on this improvident initial conclusion by urging that because both REIT managers and the *Navarro* trustees hold title to trust property "in their names," *id.* at 13 (quoting *Navarro*, 446 U.S. at 465); *id.* at 15 (trustees conducted litigation in their names "because the trustees held legal title to all trust property"), *Navarro* must control. *Id.* at 16; *id.* at 28 (capacity of trust to sue or be sued "does not alter the fact that the trustee holds legal title to trust property").

But, Americold attempts to sweep under the rug the simple fact that Maryland REIT entities, not the board of managers, hold title to the entities' property. *See* Md. Code Ann., Corps. & Ass'ns § 8-101(b) (REIT by definition is an entity "in which property is acquired [and] held"). Americold not only ignores this, but even boldly asserts: "The Americold Trust falls squarely within the *Navarro* principle. Like the trustees in *Navarro*, Americold's trustees hold legal title to the assets of the trust." *Id.* at 19. Lost on Americold is Maryland's statutory REIT definition which provides for assets held by the entity, not the managers. Indeed, Americold's trust declaration provides that the entity was formed to, *inter alia*, "acquire" and "hold" property and that the board of trustees have mere "control and authority" over REIT assets. Pet. App. at 59-60.

Americold swept up such a dust cloud that its rug can't cover it all because Americold provides no record

or statutory citation supporting its claim that Maryland REIT trustees hold title to property. Instead Americold only provides the trust declaration which shows the entity acquires and holds the property – a fact that can't be covered up and a fact that clouds Americold's primary assertion.

Second, Petitioners fail to recognize that, unlike common law trusts, Americold as a Maryland REIT is a juridical entity, and as such, it possesses the capacity to sue or be sued. *See* Md. Code Ann., Corps. & Ass'ns § 8-302(2); *see also* Dr. Wong Brief at 14-17; *cf.* § 8-102(2) (providing that a REIT is "a separate legal entity"). Americold again ignores this basic characteristic differentiating artificial entities to which *Carden* applies from cases involving natural persons suing in their own names as trustees in *Navarro*. Here, no natural persons as trustees are being sued; rather, an artificial, non-corporate juridical entity is being sued in its own right.

Third, Americold claims *Navarro* made the following pronouncement: "*Navarro* could not have been more explicit: for purposes of diversity jurisdiction, a business trust is to be treated no differently than a traditional trust." *Brief for the Petitioners* at 30. First, neither a "business trust" nor a "traditional trust" is a specific, particular, entity with similar legal rights throughout every jurisdiction. Entities named "trusts" – whether colloquially referred to as "business trusts," "traditional trusts," "common law trusts," "statutory trusts," *etc.* – can exist in various forms with distinct legal rights depending on state

law. As stated above, *Carden* and its precedent must not be ignored simply because an entity is called a "trust" under state law.

Moreover, *Navarro* said nothing, let alone explicitly, about how to "treat" a "trust," business or otherwise, for diversity. Rather, *Navarro* stands for the quite unremarkable proposition that where a trustee properly brings suit, that trustee's citizenship counts for diversity purposes. *See Carden*, 494 U.S. at 191-92. Following *Carden* and applying the "members" test to a non-corporate state law entity will hardly be "breaking new ground" by this Court. *Brief for the Petitioners* at 30.

Fourth, these analytical deficiencies similarly doom Americold's Tenth Circuit criticism that *Carden* "involv[ed] no trust, no trust property, no trustees, and no trust beneficiaries." *Brief for the Petitioners* at 8. Americold urges that the Tenth Circuit misread *Navarro* because "the trustees of Americold Trust possess virtually the same powers and authority over the Americold trust as did the trustees in *Navarro*." *Id.* But nothing could be further from the truth: the *Navarro* trustees held title to trust property; they were the payees under the notes sued upon; and they sued as natural persons to collect. 446 U.S. at 459-60. Notably, under Massachusetts law the trust had no capacity to bring suit – it must be advanced by the trustees. *See, e.g., Comm'r of Corps. & Taxation v. City of Springfield*, 321 Mass. 31, 43, 71 N.E.2d 593, 600 (1947) ("Other than for the purpose of being sued,

. the trust was not a legal entity." (citing Mass. Gen. Laws ch. 182, §§ 1, 6)).

Obviously, Americold provided no record support that its trustees hold title to all of Americold's property, and more importantly, Maryland REIT trustees are not, and indeed cannot be, parties to this suit. Md. Code Ann., Corps. & Ass'ns § 8-601(b) (trustees generally immune from suit for trust obligations). So, just like *Carden*, there is an artificial entity; it owns property in its name; it's suing or being sued in its own name under state law; and those persons who own beneficial interests in the artificial entity are shareholders or limited partners. Simply stated, Americold's state law status mirrors *Carden*'s limited partnership.

And this Court decidedly stated that *Navarro* provides no guidance to diversity suits where one party is an artificial non-corporate juridical entity. *See Carden*, 494 U.S. at 189-97 The Tenth Circuit recognized as much by correctly addressing *Navarro*'s non-applicability when citing directly to *Carden*:

> As *Carden* makes clear, however, *Navarro* does not support [the] broad proposition [that a trust's citizenship is based on its trustees' citizenship]. Instead, *Navarro* stands for the far more limited proposition that if a trustee is a proper party to bring a suit on behalf of a trust, it is the trustee's citizenship that is relevant, rather than the trust's beneficiaries.

ConAgra, 776 F.3d at 1178 (internal citation omitted) (citing *Carden*, 494 U.S. at 188 n.1, 191-92). Simply stated, the Tenth Circuit correctly applied *Navarro* and *Carden*; the court concluded that if trustees sue in their own name, the trustees' citizenship is relevant under *Navarro*. Just as importantly, if a non-corporate artificial juridical entity sues or is being sued, that entity's citizenship must be determined under *Carden*.

Fifth, Americold's insistence that Maryland REITs and other juridical entities be treated differently mangles the common law and stretches it into an unrecognizable form. Americold claims that this Court adheres to a "longstanding approach of looking to the citizenship of those who would have been liable at common law for the obligations of a non-corporate artificial entity." *See Brief for the Petitioners* at 10, 23. But, as stated above, Americold cites no authority, and indeed the cases cited by Americold merely state that the "members" or "the several persons composing [the] association" must be considered for diversity. *Id.* at 24. And, they nowhere state that the justification for this rule is that such members are "persons who would have been liable individually at common law for the entity's obligations." *Id.*

Moreover, such a muddled rule will prove dysfunctional for non-common-law entities. For instance, how does Americold's proposed holding apply to an LLC? There are no persons who would have been liable for an LLC's debts at common law since LLCs did not exist at common law. Does this mean we apply

the *Carden* rule for artificial entities that have no common law ancestry, but for newly-created statutory entities that obliquely resemble some common law institution, we apply a common law liability and real persons in control test? Americold's proposed, unfocused rule remains untethered to the Court's precedent and unworkable for the existing myriad entities which were non-existent at common law. Americold's unending common law contentions are like an ingrown hair that has festered too long. It's time to pluck the infected bristle and relieve the pain. Harmonizing the Court's precedent in light of statutory entities and other non-common-law parties naturally shows that members include those persons with a beneficial economic interest in the entity.[8]

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[8] Several courts have focused on such beneficial owners in the context of manager-managed LLCs. *See Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121-22 (4th Cir. 2004) (ignoring managers and finding that LLC citizenship depended on members' citizenship); *Morris v. WinCo Foods, LLC*, No. 3:12-CV-01216-ST, 2013 WL 139815, at *2 (D. Or. Jan. 10, 2013) ("For purposes of determining diversity jurisdiction, the analysis depends on the citizenship of WinCo's owners or members, not its managers."); *Meador v. Nashville Shores Holdings, LLC*, No. 3:10-904, 2011 WL 672562, at *2 (M.D. Tenn. Feb. 17, 2011) (rejecting argument that nondiverse, nonmember manager destroyed diversity where members were diverse); *see also Meza v. Lowe's Home Centers, LLC*, No. 15-CV-02320-LHK, 2015 WL 5462053, at *2 (N.D. Cal. Sept. 16, 2015) ("Defendant is a manager-managed LLC with its only member being Lowe's Companies, Inc. Lowe's Companies, Inc., in turn, is a North Carolina corporation with its principal place of business in North Carolina. Accordingly, Defendant is a citizen of North Carolina for purposes of diversity jurisdiction."); *Zavanna, LLC*

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D. The claimed harms of indiscriminate forum shopping if this Court maintains its longstanding doctrinal wall are both unfounded and irrelevant.

Americold improvidently warns that if this Court follows its longstanding precedent as applied in *Carden*, it would "invite gamesmanship and forum-shopping" permitting parties to sue either trustee or trust, two parties likely with different diversity citizenship. *Brief for the Petitioners* at 30-31. This position suffers several shortcomings.

First, as this case shows, many plaintiffs have no choice whom to sue, but will simply sue the persons liable under state law. For instance, Maryland REITs are subject to suit, but trustees generally are not liable for REIT obligations, much like corporate directors. Md. Code Ann., Corps. & Ass'ns §§ 8-301(2), 8-601(b). Thus, for numerous Maryland REITs, *see* NAREIT Brief at 3 ("About eighty percent of publicly traded REITs are organized under Maryland law."), a plaintiff faces no choice; it must sue the REIT entity and deal with the diversity consequences.

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v. RoDa Drilling Co., No. 4:09-CV-022, 2009 WL 3720177, at *2 (D.N.D. Nov. 3, 2009) (finding removal notice that provided information about LLC directors and managers was "insufficient to determine [LLC's] citizenship for diversity purposes."); *Ray Brown & Assocs. v. Hot Springs Senior Props., LLC*, No. 8:07CV159, 2008 WL 2271488, at *4 (D. Neb. May 29, 2008) (analyzing whether particular person had ownership in LLC and noting "the L.L.C., like the limited partnership, takes on the citizenship of all those holding equity interests in it").

Second, even if a plaintiff may sue two or more parties with differing citizenship, the plaintiff is the master of its complaint and can "craft" it to destroy diversity. This fact is not inherently objectionable and courts decidedly approve doing so with respect to the amount in controversy:

> Generally, federal courts permit plaintiffs to craft their complaints to avoid federal jurisdiction. . . . [*Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)] ("[F]ederal courts permit individual plaintiffs, who are the masters of their complaints, to avoid removal to federal court, and to obtain remand to state court, by stipulating to amounts at issue that fall below the federal jurisdictional requirement.").

De Jongh v. State Farm Lloyds, 555 F. App'x 435, 437-38 (5th Cir. 2014). Plaintiffs may also use choice of parties to avoid diversity:

> This includes a plaintiff's decision as to which parties to sue. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties."). . . . The district court lacked the authority to disregard [Plaintiff]'s choice to sue Lloyds, not State Farm, and assert diversity jurisdiction.

Id.; *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 & n.25 (1938) ("If he does not

desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove. . . And an amendment in the state court reducing the claim below the jurisdictional amount before removal is perfected is effective to invalidate removal and requires a remand of the cause. "); *Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174 (9th Cir. 1979) (nondiverse subsidiary need not be joined as defendant with diverse parent who had accepted liability, although the two arguably shared joint liability).

So, Americold's unfounded forum shopping concerns ignore that Maryland REITs remain unaffected by such concerns because trustees generally can't be sued, but parties suing REITs have no choice but to sue the artificial entity. And even where multiple parties are subject to suit, this Court has long professed that plaintiffs, masters of their complaints, can avoid federal jurisdiction through choosing defendants and limiting amounts in controversy.

E. Maryland REITs' similarities to corporations fail to warrant upending this Court's doctrinal wall between corporations and all other non-corporate juridical entities.

Amicus NAREIT insists that Maryland REITs are functionally similar to corporations requiring placement on that side of the Court's diversity

citizenship doctrinal wall. *See generally* NAREIT Brief. This argument lacks merit for several reasons. *First*, *amicus* notes that corporations and Maryland REITs share certain characteristics: a Maryland REIT is a "separate 'juridical person'; created by state law and given its own 'birth certificate'; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board." NAREIT Brief at 11. Despite *amicus*'s recognition that the Court relied on these characteristics when first raising the doctrinal wall, *amicus* fails to, and indeed cannot, support a claim that REITs must now be placed alongside corporations.

Naturally, if the Court adopts *amicus*'s suggestion, other state law entities also must be placed alongside corporations, likely eliminating the wall altogether. For instance, LLCs as separate legal entities must file articles with the state. *E.g.*, Kan. Stat. Ann. § 17-7673(a), (b). LLC members are not liable to third parties for LLC debts, and managers chosen by the members may manage the LLC. Kan. Stat. Ann. §§ 17-7688, 17-7693. Limited partnerships possess the same characteristics. *See, e.g.*, Kan. Stat. Ann. § 56-1a151 (LP formed by filing certificate with state); § 56-1a203 (limited partners not liable for LP obligations); § 56a-201 (all partnerships are distinct entities[9]); § 56-1a253, § 56-1a255 (general partner or partners operates partnership); § 56-1a251 (general

[9] Kan. Stat. Ann. § 56-1a604 provides that the general partnership law fills in any gaps left by Kansas's limited partnership law.

partners added by consent of all partners or as provided in agreement). Notably, this Court has previously recognized, but nonetheless rejected, these policy concerns, acknowledging that the distinction between corporations and other state law entities is sometimes "technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." *Carden*, 494 U.S. at 196. Yet, the Court has "firmly resisted extending that treatment to other entities." *Id.* at 189.

Second, *amicus* highlights, ostensibly supporting its insistence that Maryland REITs must be treated as corporations, that in general REITs need not be trusts, but may be corporations. *See* NAREIT Brief at 4 n.2, 16. This alone undercuts *amicus*'s claims: obviously REITs formed as "associations" are distinct from corporations under Maryland statutes which recognize REITs both as "unincorporated business trust[s] or association[s]" and corporations, giving organizers entity choices much like choosing an LLC, limited partnership, or corporation. In short, federal courts evaluating diversity need only determine a REIT's corporate status and apply *Carden*; muddying the waters with threshold jurisdictional litigation analyzing which artificial entities most resemble corporations and should be treated as such serves no transcending purposes justifying the long-suffering judicial efforts doubtlessly necessary to conduct such litigation.

Third, the fact that Maryland REITs may choose to be corporations eviscerates the policy argument that non-corporate REITs need the protection offered by federal courts sitting in diversity. *See* NAREIT Brief at 5, 10. By *amicus*'s admission, Maryland REIT organizers may choose corporation or an unincorporated entity status, triggering certain consequences, including tax effects. NAREIT Brief at 4 n.2, 16. But, this choice also, just like choosing to incorporate or form an LLC, has diversity jurisdiction consequences. Maryland REITs wishing to make federal court access in diversity more likely need only incorporate.

So, Congress need not expand diversity jurisdiction providing additional federal court access to Maryland REITs. NAREIT Brief at 31. Instead, a Maryland REIT need only choose corporation status to increase diversity likelihood. Md. Code Ann., Corps. & Ass'ns §§ 8-501.1(b) (Maryland REIT can merge into corporation), 8-701(b) (Maryland REIT can convert to corporation). And would-be investors can simply choose REIT corporations, rather than REIT trusts or associations, if they wish to increase their investment vehicles' chances of federal diversity jurisdiction.

Finally, as *amicus* highlights, "the majority of publicly traded REITs are organized under state law as corporations," and after Congress amended REIT tax law to allow corporations, "REITs gradually began to migrate to Maryland corporations (or occasionally Delaware corporations, or other business forms for state and local tax reasons)." NAREIT Brief at 4 n.2,

16. If this is so, NAREIT's claims regarding federal court access ring hollow at best.

In sum, this Court need not breach its long-standing doctrinal wall to afford a few Maryland REITs access to federal courts because they claim to be otherwise defenseless to state court vagaries. Maryland REITs choosing not to incorporate, or merge into corporations, pass on such protection.

II. Even if Americold's citizenship is determined by the trustees' citizenship as urged, Americold failed to establish diversity jurisdiction.

A. Flawed diversity jurisdiction invalidates any final judgment where indispensable parties are not completely diverse at the time judgment is entered. Here, the Americold trustees never established complete diversity between themselves and the Tenant Plaintiffs at the time judgment was entered. Thus, Americold's claim that the trustees' citizenship determines the entity's citizenship leads only to remand.

District court judgments in removed diversity jurisdiction cases must be vacated where indispensable, nondiverse parties remain at the time of

judgment.[10] *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951). In other words, incomplete diversity at removal is not fatal where there is "complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and judgment." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996). But where the jurisdictional defect remains uncured, "linger[ing] through judgment in the District Court," the judgment must be vacated. *See id.* at 76-77 ("[I]f, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated."); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Here, even accepting *arguendo* Petitioners' claim that Americold's citizenship must be determined by the trustees' citizenship, federal subject matter jurisdiction simply never existed. That is, at removal, Americold trustees were citizens of California and Massachusetts. *See* Pet. App. at 51. And, on the other side of the diversity ledger, Plaintiffs Safeway and

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[10] Appellants initially suggested to the Tenth Circuit that if it found diversity jurisdiction lacking due to Safeway's and Kraft's citizenship, such parties should have been dismissed as dispensable, nondiverse parties. Appellants now realize they took that position improvidently, even perhaps hastily, because hopes that a merits decision shortening Appellants' "journey of a thousand miles" impeded Appellants' legal analysis. However, after opportunity for a more thorough review, Respondents believe the pertinent authorities cited herein dictate Safeway and Kraft are not dispensable, nondiverse parties to which *Newman-Green* applies.

Hanover were also California and Massachusetts citizens. J.A. at 23. This diversity defect remained "[un]cured" – it "lingered through judgment." *Cf. Caterpillar*, 519 U.S. at 77 Naturally, this requires remand even if the Americold trustees' citizenship is determinative for diversity purposes.

B. The limited diversity exception recognized in *Newman-Green* is inapplicable here. Remand is required.

Petitioners urge this Court to sift the record piecing together subject matter jurisdiction on appeal by recognizing their trustee-only-diversity-citizenship rule. Yet Petitioners ignore the fact that there is no diversity even under Petitioners' urged trustees test. Indeed, Petitioners obliquely reference this by claiming that because Kraft and Safeway did not appeal the District Court's merits judgment, they should be ignored. *Brief for the Petitioners* at 5 n.2.

Despite Petitioners' claims, a party's choice not to appeal in no way retroactively cures subject matter jurisdiction defects. *Newman-Green* provides no stronghold for Americold in that the plaintiffs there initially filed suit in federal district court against multiple defendants based on diversity jurisdiction, and while on appeal, the Seventh Circuit uncovered a defendant's citizenship which "destroyed complete diversity." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828-29 (1989). The plaintiff filed an agreed-to motion to dismiss the nondiverse

defendant, but the *en banc* court held that fatal subject matter jurisdiction wounds can't be healed by dismissing the nondiverse defendant in the court of appeals. *Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916 (7th Cir. 1988) (*en banc*).

This Court reversed, holding that courts of appeals (like district courts) have the authority to cure a jurisdictional defect "by dismissing a dispensable nondiverse party," but emphasizing that "such authority should be exercised sparingly" so as to "carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." *Newman-Green*, 490 U.S. at 837-38. The Court concluded that granting the plaintiff's agreed-to motion to dismiss the nondiverse defendant was appropriate because the parties suffered no harm. *Id.* at 838.

But, Kraft and Safeway occupy much different positions than the *Newman-Green* dispensable defendant because they have exercised rights to permissively join as plaintiffs. Indeed, their claims and Respondents' claims involve the same transaction or occurrence and same legal and factual questions. Fed. R. Civ. P. 20(a). In other words, Kraft and Safeway are not "misjoin[ed]." They are indispensable and unable to be dropped under Fed. R. Civ. P. 21.

Moreover, unlike *Newman-Green*, Kraft and Safeway never requested their claims be dismissed or severed. Instead, Petitioners request that this Court ignore Kraft's and Safeway's claims existing at the

time of judgment to now create diversity jurisdiction on appeal. Indeed, lower courts have refused to extend *Newman-Green* by permitting defendants to dismiss nondiverse plaintiffs in order to retain jurisdiction. *Curry v. U.S. Bulk Transp., Inc.*, 462 F.3d 536, 542 (6th Cir. 2006); *Baker v. Tri-Nations Express, Inc.*, 531 F. Supp. 2d 1307, 1317 (M.D. Ala. 2008) ("While several courts have used *Newman-Green* and their discretion under Rule 21 to drop dispensable defendants and thus preserve subject matter jurisdiction, '[n]one of these cases, however, support dropping a nondiverse plaintiff, over the plaintiff's objection, in order to retain (or create) subject matter jurisdiction.'" (quoting *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1289 (M.D. Fla. 2002))).

For example, in *Curry*, the Sixth Circuit rejected a defendant's proposed *Newman-Green* extension to rescue diversity by dismissing a plaintiff's claim in a case removed from state court. 462 F.3d at 542. According to the court, *Newman-Green* involved "fundamentally different" circumstances. *Id.* "*Newman-Green* did not involve removal" and, thus, "it was the plaintiff [ ] who wished to be in federal court all along [and] who sought to dismiss the nondiverse defendant." *Id.* The *Curry* court noted that, if a plaintiff's claims against nondiverse defendants were dismissed, the plaintiff would be forced to expend further resources initiating a second lawsuit in state court that would otherwise be unnecessary. *Id.* This "two-suit resolution," the Court found, results in "an utter waste of judicial resources," and as such, the

court remanded the action "in its entirety." *Id.* at 542-43.

Here, Kraft and Safeway chose state court, but Petitioners removed claiming diversity jurisdiction. Unlike *Newman-Green*, Kraft and Safeway are not requesting their claims be dismissed to preserve diversity. In *Newman-Green*, "the triggering factor for the appellate authority to dismiss the nondiverse defendants to cure the lack of jurisdiction was the *plaintiff's* motion to enable it to proceed with the case against diverse defendants in federal court." *Curry*, 462 F.3d at 543 (emphasis in original). Furthermore, dismissing Kraft and Safeway to resurrect diversity jurisdiction forces those parties to re-file their claims in state court. This "two-suit resolution" results in a waste of judicial and party resources.

Finally, any alternative suggestion that Kraft's and Safeway's claims should be "severed" under Rule 21 is as unworkable as it is unsupported. Permitting defendants to create federal diversity jurisdiction by severing nondiverse plaintiffs' claims will flood federal courts with new diversity cases. And, as here, the nondiverse plaintiffs' claims often arise out of the same transaction or occurrence and involve the same legal and factual questions. *See* Fed. R. Civ. P. 20(a)(1). The nondiverse plaintiffs' claims should not be permitted to proceed on a dual track – likely resulting in clashing state court and federal court rulings – just to establish diversity jurisdiction.

Thus, even if Americold's citizenship is measured only by its trustees' citizenship, federal diversity jurisdiction never existed at the time of the judgment. Any efforts to raise such jurisdiction from the dead are without authority under the federal rules.

CONCLUSION

This step in the thousand-mile journey must ignominiously end with remand to state court, in that diversity must be measured by Americold's beneficial owners nominally called shareholders under Maryland law and not its board of managers called trustees. Americold invoked diversity jurisdiction as a non-corporate Maryland artificial entity possessing capacity to sue and be sued, and as such, its citizenship must be measured by aggregating all of its shareholders' citizenship, thus making Americold a citizen of every state its shareholders are citizens.

Maryland REITs, like limited partnerships and limited liability companies, can't be morphed into something they are not by simply drawing an analogy between common law trust beneficiaries' limited liability and the limited liability of the REIT's, limited partnership's, or limited liability company's beneficial owners. To do so ignores the decided and instinctive differences between common law trusts and those artificial entity associations. This Court erected a doctrinal wall for artificial entities with only two sides, and Americold's strained efforts to

climb over to the corporation side, or erect yet another wall somehow segregating non-corporate associations into further sub-classifications is unavailing.

Thus, for the foregoing reasons, Respondents request this court affirm the decision of the Tenth Circuit and hold that state law artificial non-corporate juridical entities' citizenship is measured by aggregating the citizenship of the entities' beneficial owners, and likewise affirming the Tenth Circuit's order remanding the case to state court.

Respectfully submitted,

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No. 14-1382

IN THE

Supreme Court of the United States

AMERICOLD REALTY TRUST,

Petitioner,

v.

CONAGRA FOODS, INC., ET AL.,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case presents the important question of how the citizenship of a trust should be determined for purposes of diversity jurisdiction when the trust itself is named as a party. Consistent with *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), no party contends that the trust should be treated as having citizenship in its own right—such that the trust, like a corporation, would carry the citizenship of its place of formation or principal place of business. Rather, it is common ground that courts must look *through* the trust to some other group of persons, the citizenship of whom would then be attributed to the trust. The sole question before this Court is: to what group of persons should courts look in making that inquiry?

Petitioner Americold Realty Trust ("Americold") submits that this Court's precedents already provide a clear and easily administrable answer to that question. Simply put, in cases involving trusts and trustees, where the bona fide trustees of a trust possess the "customary powers to hold, manage, and dispose of [trust] assets for the benefit of others," it is their citizenship—and not that of the beneficial holders or other constituencies—that controls for purposes of diversity jurisdiction. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980); see also Pet. Br. 11-14; *Bullard v. City of Cisco*, 290 U.S. 179, 189-190 (1933); *Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 218 (1904).

Although the *Navarro* line of cases involved actions in which the trustees were parties in their own name, whereas here the trust itself is the party, the practice

of looking through the trust (as *Carden* instructs) brings the analysis back to the same question that was presented in *Navarro*: as between the trustees and the beneficiaries, whose citizenship should be considered? And as *Navarro* explains, it makes no sense to look to beneficial holders in a case involving a trust because historically it is the trustee who controls the trust property, including any litigation. 446 U.S. at 464-65. Beneficiaries, by contrast, have no power to control trust assets and, in some trust structures, may not even be identifiable. The distinction in *Navarro* between trustees and beneficiaries is supported by centuries-old trust law recognizing that the separation of legal from equitable or beneficial title necessarily means that the trustees, and not the beneficiaries, control the trust property and otherwise are the embodiment of the trust in trust-related litigation.

In contrast to the straightforward rule that follows from the *Navarro* line of cases, respondents articulate no test—clear or otherwise—for federal courts to apply in determining the citizenship of a trust. Instead, they describe a series of supposedly unique legal attributes of Maryland real estate investment trusts (REITs), and argue that these attributes mean that Maryland REITs are not "real" trusts; that they instead should be treated like unincorporated business associations under *Carden*; and that, in that context, courts should consider the citizenship of all of the beneficiaries of such a trust in lieu of, or in addition to, that of the trustees. See Resp. Br. 19-33.

This myopic focus on one state's REIT law not only evades the question presented, but is incorrect. Maryland REIT law is unremarkable in any way relevant here. It simply allows the REIT to sue and be sued in

its own name—a common attribute of certain types of trusts in many states, and one that does not render the trust anything less than a "real" trust. The fundamental aspects of trust law that the Court outlined in *Navarro* still are present: a separation of legal from equitable title and the trustees' complete and exclusive control of the trust property. These fundamental trust characteristics compel the conclusion that, when looking through the trust in the context of determining citizenship, the trustee's citizenship, rather than that of the beneficial or equitable holders, should govern. Although some modern business trusts differ in certain ways from traditional trusts, the key defining characteristics of the trust identified in *Navarro* are common and dispositive. Respondents' litany of legal details supposedly unique to Maryland REITs does not affect that analysis.

As for respondents' newly proposed alternative ground for affirmance, although it lacks merit, this Court need not and should not address the issue in the first instance. The Court should resolve the question presented in Americold's favor, vacate the judgment below founded on faulty reasoning, and remand for further proceedings—including appropriate consideration of the alternative ground that respondents now raise.

ARGUMENT

A. The Court Should Reaffirm the Clear, Longstanding Rule that the Citizenship of Trustees Controls in Cases Involving Trusts and Trust Assets

1. This Court long has held that, when the issue of diversity jurisdiction arises in litigation involving

trusts and trust assets, it is the citizenship of the bona fide trustees, and not that of any beneficial or equitable holders of trust property, that governs the inquiry. Respondents do not take issue either with those prior holdings or with the principle that jurisdictional rules should be "as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); see Resp. Br. 16. They nonetheless contend that in a case involving a Maryland REIT, courts should apply a special analysis that looks to all "members" of the REIT—a group that, in respondents' view, should include all of the trust's beneficial or equitable holders. See Resp. Br. 19-33.

The Court should reject respondents' invitation to fashion a test based on any supposedly unique aspects of Maryland law, and should instead adhere to its longstanding rule that the citizenship of the trustees, not that of trust beneficiaries, is determinative in cases involving trust assets. The Court has applied that rule repeatedly in cases in which one or more trustees is named as a party to the litigation, rejecting the argument (advanced in *Navarro*) that the citizenship of the beneficiaries should control. See 446 U.S. at 461-62. The same rule should apply where, as here, the trust itself is named as a party and *Carden* instructs courts to look *through* the trust entity. Courts considering the citizenship of the trust party, after effecting the *Carden* "look-through," are faced with the exact same question that was presented in *Navarro*: in a case involving a trust and trust property, whose citizenship should control, that of the trustees or that of the beneficiaries? For reasons that fully apply here, and following decades of precedent, the Court in *Navarro* squarely held that the trustees' citizenship, not that of the beneficiaries, controls. That result makes eminent

sense—both in a case involving named trustees and in a case involving a named trust through which the court must look under *Carden*—because under the fundamental trust principle of separation of legal from equitable title, the trustees, and not the beneficial or equitable holders, control the trust property, including its disposition in litigation affecting the trust. See Pet. Br. 15-19; 28-31.

2. Respondents fail to offer anything resembling an administrable test that could be applied by lower federal courts confronted with litigation in which a trust is a party.

Respondents' main argument is that, despite the word "trust" in its name, a Maryland REIT is not actually a trust at all, but is more akin to an unincorporated association, such that it should take on the citizenship of all of its "members" under the second half of this Court's analysis in *Carden*. See Resp. Br. 19-22. Respondents further posit that, under the supposedly unique aspects of Maryland law, the "members" of a Maryland REIT should include not only the trustees, but also (or instead) the beneficial or equitable holders of the trust property. See *id.* 23-25.

Respondents' extensive discussion of the particular attributes of Maryland REITs is both irrelevant and wrong, see *infra* at 13-16, but even on its own terms, the argument raises more questions than it answers. How, for instance, should a federal court decide whether a trust in a particular case is a "real" trust implicating the *Navarro* line of cases, or, as respondents would have it, a phony trust such as a Maryland REIT? Would the answer depend on particular details of the relevant state's law? If so, which details? The confus-

ing morass of verbiage respondents offer, see Resp. Br. 21-22, does not answer these questions.

The only hint of a test that can be gleaned from respondents' brief is the suggestion that any trust with the state law capacity to sue or be sued in its own name should be treated for diversity purposes not as a true trust, but rather as an unincorporated association subject to the "members" test of *Carden*. See Resp. Br. 22. But that proposed test would not answer the question presented here or in most other cases. First, it is not at all clear (and respondents nowhere explain) why a trust's ability to sue or be sued in its own name should trigger an inquiry into the citizenship of the *beneficiaries*, as opposed to that of the trustees. As Americold noted, neither at common law nor in modern practice in *any* jurisdiction are beneficiaries generally authorized to control trust property, conduct trust litigation, or held liable for the obligations of a trust. See Pet. Br. 15-19.

Similarly, respondents have no theory for why the capacity to sue and be sued should determine what constitutes a "real" trust for diversity purposes. Certainly, trusts at common law generally lacked the capacity to sue or be sued in their own names. See Pet. Br. 16. But it is equally true that trusts had many other attributes at common law that have been altered over the years by certain states' laws. No one would contend that such alterations mean that trusts in these states are no longer "real" ones. Indeed, like trusts, partnerships and associations also lacked the capacity at common law to sue or be sued in their own name. Pet. Br. 24. Many states have altered that rule by statute, see *ibid*, yet this Court never has suggested

that this change somehow deprives such entities of their status as partnerships or associations.

Nor would a rule that turns upon an entity's ability to sue or be sued be easily administrable. Litigation over whether a particular type of trust can sue and be sued under state law is commonplace. See, *e.g.*, *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (per curiam) (noting conflicting state authority regarding ability of trust to sue or be sued in its own name); *Colorado Springs Cablevision, Inc. v. Lively*, 579 F. Supp. 252, 253-54 (D. Colo. 1984) (noting uncertainty under state law regarding same issue). Cf. *Swanson v. Comm'r of Internal Revenue*, 296 U.S. 362, 364 & n.3 (1935) (noting uncertainty regarding validity under Illinois law of trust agreement permitting trust to sue and be sued in its own name). A rule under which jurisdictional determinations would turn upon an entity's ability to sue and be sued under state law is a recipe for confusion and satellite litigation—exactly what this Court strives to avoid in jurisdictional inquiries. See *Hertz*, 559 U.S. at 94.

Americold's proposed rule, by contrast, would present courts with no new logistical or practical difficulties. It would involve only two simple questions: first, does the relevant state law treat the entity as a trust? And second, does the trust structure involve a separation of legal from equitable title, such that the trust is managed by trustees who exercise the "customary powers to hold, manage, and dispose of [trust] assets for the benefit of others," 446 U.S. at 464, as is required to meet the *Navarro* real-party-to-the-controversy test? If so, then the citizenship of the

trustees is controlling. No more complex analysis is required.[1]

B. Trustees, Rather than Beneficiaries, Are the Analogues in the Trust Context of the "Members" of a Partnership or Association

1. There is generally *no* practical difference between naming a trust and naming a trustee as a party. Yet respondents insist that where a trust is a named party to litigation in its own right, *Carden* dictates that courts consult the citizenship of the trust's "members"—which respondents insist must include the trust's beneficiaries. Resp. Br. 23. Respondents take *Carden* too far. Certainly, *Carden* controls in holding that an unincorporated entity (such as the trust at issue here) does not take citizenship in its own right, as would a corporation. 494 U.S. at 189-192. Thus, courts must look *through* the unincorporated entity to some other constituents to determine its citizenship.

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[1] Respondents accuse Americold of "trot[ting] out the same old 'real party to the controversy test' urged and rejected in *Carden*." Resp. Br. 32. But respondents do not acknowledge *why* the *Carden* Court found that test inapplicable. It did so for two reasons: first because the line of cases beginning with *Chapman v. Barney*, 129 U.S. 677 (1889), foreclosed the argument that any non-corporate artificial entity that was a "real party" could be a citizen in its own right for diversity purposes, *Carden*, 494 U.S. at 191-92; and second because the "real party" test as applied in *Navarro* involved "the distinctive common-law institution of trustees," rather than members of an unincorporated association or partnership, *Carden*, 494 U.S. at 194. Those concerns are not implicated here, because no party contends that a trust should be afforded citizenship in its own right, and because this case, unlike *Carden*, *does* involve a trust and trustees. See Pet. Br. 20-23.

But *Carden*'s identification of those constituents with "members" is uninformative in a case involving a trust, which (unlike an association or a partnership) has no "members" and which this Court's precedents and the common law always have treated as distinct from other types of unincorporated entities.

Even exporting *Carden*'s terminology, there can be no doubt that it is the trustees of a trust, not its beneficiaries, who occupy a position akin to the "members" of a partnership or association. Pet. Br. 23-26. At common law, both trusts *and* partnerships and associations lacked the ability to sue or be sued in their own names. Just as litigation involving the assets or liabilities of partnerships or associations was conducted by the members, so was litigation involving the assets or liabilities of trusts conducted by the trustees. That doctrinal history explains why the Court has continued to consult the citizenship of the members of a partnership or association even in cases where the partnership or association itself is named as a party to litigation in its own right. See *id.* 24. The same logic should lead this Court to conclude that the citizenship of trustees should be consulted in cases where a trust is a party to litigation in its own right. See *Thomas*, 195 U.S. at 218 (citizenship of trustees governed even though the board of trustees, rather than the individual trustees, was the named party).[2]

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[2] Respondents complain of a lack of authority for the view that the common law rule governing actions involving partnerships and associations has guided this Court's treatment of those entities for citizenship purposes. Resp. Br. 38. But it is undoubtedly "'the tradition of the common law'" upon which the Court's jurisprudence in this field is founded, with any "further

Moreover, the very structure of a trust, in which legal title is separated from equitable or beneficial title and is placed in the hands of the trustees, distinguishes the trust structure from that of a partnership, in which property at common law was held and controlled by all of the "members." As *Carden* explains, modern innovations that distinguish among types of members (such as limited partnerships) provide no basis to disturb this Court's jurisdictional principles. But the clear distinction between trustees and beneficiaries is the exact opposite of a modern innovation—it dates back to the ecclesiastical courts.

2. Nothing in respondents' brief disturbs this straightforward conclusion. Respondents assert that "this Court decidedly left no doubt that [an] unincorporated artificial entity's 'members' include, at minimum, all of the entity's beneficial owners." Resp. Br. 23. But the only authorities respondents cite (see *id.* 23-24) are cases involving partnerships—all of which fall within the common-law rule that all partners are liable for a partnership's obligations. Those cases say nothing about beneficial ownership, much less suggest that every person who may have a direct or indirect beneficial ownership interest in a trust qualifies as a "member" for purposes of diversity jurisdiction.[3]

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adjustments to be made by Congress." *Carden*, 494 U.S. at 190, 196 (quoting *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480 (1933)); see also *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 455-456 (1900) (rejecting argument that change in state law regarding ability of party to sue and be sued warranted departure from Court's longstanding approach to determining citizenship).

[3] Respondents also cite Justice Ginsburg's observation in a dissenting opinion in *Grupo Dataflux v. Atlas Global Group,*

Respondents' proposed "beneficial ownership" test for citizenship cannot be reconciled with this Court's precedents. As Americold noted (Pet. Br. 32), in *Thomas*, the Court held that where the Board of Trustees of the Ohio State University was named as a defendant as an entity (and the individual trustees were not named), the relevant citizenship was nonetheless that of the trustees. 195 U.S. at 218. The Court did not, as respondents' test would require, ask who were the "beneficial owners" of the state university. Respondents' beneficial-ownership test also is incompatible with this Court's many cases holding that, in litigation conducted by a bona fide personal representative on behalf of a third party holding a beneficial interest in the lawsuit, the representative's citizenship, and not that of the beneficiary, controls. See Pet. Br. 14-15. Respondents make no effort to square their rule with these cases.

Nor are respondents correct that, under Americold's rule, limited liability companies, limited partnerships, and corporations "must be treated like common law trusts, measuring diversity of citizenship by their managers," Resp. Br. 25. At common law, partnerships, associations, and corporations were treated as

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L.P., 541 U.S. 567, 585 n.1 (2004), that some lower courts have treated LLCs, for diversity purposes, as citizens of each state in which one of their "members" is a citizen. Resp. Br. 24. That point is irrelevant because the main rationale of those cases rests not on beneficial ownership but rather on the conclusion that, in light of the close relationship between LLCs and partnerships (and the absence of any common law rule governing LLCs), LLCs presumptively should be treated like partnerships for citizenship purposes. See, *e.g.*, *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (cited in *Grupo Dataflux*, 541 U.S. at 585 n.1 (Ginsburg, J., dissenting)).

fundamentally different from trusts. Pet. Br. 15-19. As this Court's precedents make clear, the operational similarities between some types of trusts, on the one hand, and some types of partnerships, associations, or corporations, on the other, does not require that some or all trusts be treated like those other entities for citizenship purposes—just as the functional similarities between corporations and limited partnerships or LLCs does not mean that those entities must be treated alike. See, *e.g.*, *Carden*, 494 U.S. at 196; *Navarro*, 446 U.S. at 465; Pet. Br. 29-30; *infra* at 13-14. Given the clear state laws permitting the creation of statutory trusts and governing their existence, the lower courts should have no difficulty distinguishing what entities would be subject to the rule for trusts and what entities would not. And if state law should ever devolve to the point of authorizing "sham" trusts that lack any attributes of a *bona fide* trust—an eventuality that has not occurred to date—this Court or Congress could address the problem at that time.

Respondents also ask the Court to disregard the many nineteenth-century cases that draw an explicit parallel between the trustees of a trust and the members of a partnership or association, see Pet. Br. 25-26, contending that these cases "involve only non-juridical, unincorporated common law trusts or associations without capacity to sue or be sued under state law," Resp. Br. 28-29. That response misses the point. It is common ground that trusts and associations lacked the capacity to sue or be sued at common law. See Pet. Br. 24. The point is that, in holding that litigation must be conducted by the members of an association or the trustees of a trust, these courts treated the two positions as analogous—namely, that for purposes of litiga-

tion, an association is to its members as a trust is to its trustees. *Id.* 25; see, *e.g.*, *Thomas v. Dakin*, 22 Wend. 9, 34-35 (N.Y. Sup. Ct. 1839). That congruence confirms that, assuming *Carden*'s "member" test applies here, it is the trustees of a trust, and not its beneficial or equitable holders, who should be considered the trust's "members."

C. Respondents' Discussion of the Particular Attributes of Maryland REITs Is Both Irrelevant and Wrong

Respondents dwell upon the particular attributes of Maryland REITs, of which the Americold Realty Trust is one. See Resp. Br. 13-39. This is a puzzling sequel to their Response to Americold's certiorari petition, which urged this Court to grant review and never suggested that Maryland REITs had *any* attributes that would make this case an inappropriate vehicle for considering the much broader question presented in the petition. Regardless, respondents' arguments about the supposedly distinctive features of Maryland REITs lack merit.

1. As noted above, it is irrelevant that Maryland REITs may resemble other forms of business organization in certain respects. This Court, for good reason, has long eschewed citizenship tests that turn upon a functional analysis of how a particular type of entity operates. The Court has emphasized that formalism "has been the character of our jurisprudence in this field," *Carden*, 494 U.S. at 196, and more specifically has held that a trust's resemblance to other forms of business organization "has no bearing" on the citizenship inquiry, *Navarro*, 446 U.S. at 465. Even if the Court were to abandon that approach and look to prac-

tical business realities, it would make far more sense to adopt the rule proposed by amicus National Association of Real Estate Investment Trusts—under which REITs would be treated like corporations—than to adopt respondents' convoluted approach.

2. In any event, nothing meaningfully distinguishes Maryland REITs from all other types of trusts for citizenship purposes. Respondents suggest that Maryland REITs are unusual in that, under Maryland law, all such trusts hold legal title to the trust property in their own name. Resp. Br. 34-35. But that is simply incorrect, according to the very Maryland statute respondents cite—which explicitly states that a REIT may hold and dispose of legal title to property *either* "in the name of the trust *or in the name of its trustees*." Md. Code Ann., Corps. & Ass'ns § 8-301(12) (emphasis added).

In that respect, Maryland law mirrors the laws of many other states, under which laws the legal title to trust property may be held *either* by the business trust in its own name *or* by the trustees in their names. See, *e.g.*, Nev. Rev. Stat. § 88A.210(3) ("a business trust may hold or take title to property in its own name, or in the name of a trustee in the trustee's capacity as trustee"); S.D. Codified Laws § 47-14A-22 ("legal title to the property of the business trust ... may be held in the name of any trustee of the business trust, in its capacity as such, with the same effect as if such property were held in the name of the business trust"); 15 Pa. Cons. Stat. Ann. § 9502(a), (c) (same). In other states, title to the property of a business trust may be vested in either the business trust alone (see Va. Code Ann. §§ 13.1-1210, 13.1-1270) or in the trustees alone (see, *e.g.*, Ala. Code § 19-3-62; Ky. Rev. Stat. Ann.

§ 386.390), as is also the case with traditional trusts, see Pet. Br. 15-17. These state law variations are an unsound basis for making distinctions that would alter citizenship status.

Indeed, the fact that *all* states place legal title in the trust itself, in the trustees, or in both—but *never* in the beneficiaries—confirms that, as with traditional trusts, business trusts and other statutory trusts embody the fundamental trust principle of separation of legal from equitable title. In light of that separation and the placement of absolute control of trust property in the hands of the trustees, regardless of where formal title is held, courts should continue looking to the citizenship of the trustees, not that of the beneficiaries.

Respondents repeatedly stress that Maryland REITs may sue or be sued in their own name—a fact that they suggest should make a difference here. See Resp. Br. 20, 35. But, as Americold noted (Pet. Br. 27-28), the same is true of most business trusts across the country—including the Massachusetts trust at issue in *Navarro*. See 446 U.S. at 459 (*Navarro* trust was "a business trust organized under Massachusetts law"); *Morrison v. Lennett*, 616 N.E.2d 92, 94, n.7 (Mass. 1993) (business trusts may be sued directly under Massachusetts law). It nonetheless remains the trustees, not the beneficiaries, who control the conduct of the trust's litigation and generally remain liable in their own names for the trust's obligations. Pet. Br. 28-29.

3. Finally, respondents are incorrect to suggest that the trustees of Americold Realty Trust somehow lack the powers and duties of ordinary trustees. Americold's articles of trust clearly state that the trustees

"shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary or appropriate to conduct the business and affairs of the Trust." Pet. App. 56, 60. That includes the power, "without limitation" and "without any action by the shareholders of the Trust," to "adopt, amend, and repeal Bylaws," to "elect officers in the manner prescribed by the Bylaws," and even to "terminate the status of a Trust as a real estate investment trust under the Code." *Id.* 61. Americold's trustees are not, as respondents would have it, merely "a titular board of managers." Resp. Br. 7. They have the same powers and serve the same function as trustees in this Court's prior cases, including *Navarro*. See 446 U.S. at 464 (discussing "customary powers" of trustees "to hold, manage, and dispose of assets for the benefit of others").

D. Respondents' Brief Confirms the Significant Practical Problems the Court of Appeals' Approach Would Entail

As Americold explained in its opening brief (at 30-31, 33-35), the Court of Appeals' rule not only would provide obvious opportunities for litigation gamesmanship but would be burdensome and difficult (or impossible) for courts and litigants to apply. Respondents' brief does not demonstrate otherwise.

A fatal practical problem with the Court of Appeals' approach is that, for many trusts, it cannot be easily applied, or even applied at all. As Americold noted, many trusts, such as charitable and public trusts, have no beneficiaries, or the beneficiaries may not be ascertainable at the time of litigation. Pet. Br. 34. Cf.

Thomas, 195 U.S. at 213-14, 218. For many other trusts, the beneficiaries may be so numerous, and ever-changing, that reliably ascertaining their citizenships at the time of litigation proves to be a daunting task. Pet. Br. 34-35. Respondents' brief ignores these important practical considerations.

As for gamesmanship around naming the trust or the trustees to destroy or create diversity, respondents again revert to a narrow focus on Maryland REITs, asserting that naming the trustees of these entities is not a genuine option because they "generally are not liable for REIT obligations." Resp. Br. 40. That is an overstatement: Maryland REIT trustees remain liable in some circumstances. See Md. Code Ann., Corps. & Ass'ns § 8-601(b); Md. Code Ann., Cts. & Jud. Proc. § 5-419(a)-(c). More importantly, any rule this Court announces will apply to other entities besides Maryland REITs, and in many other states, the trustees of a business trust do remain personally liable for the obligations of the trust, even though the trust may also be sued in its own name. See Pet. Br. 28-29 (collecting authorities); see also, *e.g.*, *N.H. Ins. Co. v. McCann*, 707 N.E.2d 332, 338 (Mass. 1999); *Goldwater v. Oltman*, 292 P. 624, 631 (Cal. 1930); *Betts v. Hackathorn*, 252 S.W. 602, 604 (Ark. 1923). In these jurisdictions, there is no escaping the fact that the Court of Appeals' rule would invite gamesmanship. Sue the trustee, look to the trustee's citizenship; sue the trust, look to the beneficiaries' citizenship. See Pet. Br. 30-31.

Respondents' second response is to ignore the forum shopping problem and suggest that plaintiffs always may seek to craft their complaints to create or avoid diversity. Resp. Br. 41-42. But this Court long has recognized that, all other things being equal, procedur-

al and jurisdictional rules should minimize opportunities for forum shopping. See, *e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004); *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990). The cases cited by respondents do not hold otherwise. No doubt, a plaintiff may decide not to sue diverse parties, or not to seek full damages, in order to avoid diversity. But those choices come with real-world consequences: certain parties are not before the court, or the amount at stake in the lawsuit is limited. By contrast, the decision whether to sue a trust or its trustees generally entails *no* real-world consequences where recovery is sought from trust assets. Announcing a rule under which such an otherwise meaningless distinction would result in different jurisdictional outcomes would create costless and unseemly opportunities for forum shopping.

E. The Court Need Not and Should Not Reach Respondents' Belated Alternative Argument in Support of Affirmance, which Lacks Merit in Any Event

Respondents contend that the Court of Appeals' no-jurisdiction holding should be affirmed on the alternative ground that, even if this Court adopts Americold's view on the question presented, complete diversity was lacking at the time of removal and judgment due to the presence of two parties (Safeway and Kraft) that did not appeal the district court's judgment. Resp. Br. 47-48. The Court need not and should not reach that issue, but if it does, it should reject respondents' argument.

The appearance in respondents' brief of this alternative ground for affirmance is highly unusual. At the certiorari stage, respondents agreed with petitioners

that the question presented warranted this Court's review. Nowhere in their brief responding to Americold's cert petition did respondents suggest that the presence of Safeway and Kraft in the district court might pose an obstacle to this Court's review of the question presented. Cf. S. Ct. Rule 15.2. As respondents concede, they took the opposite position before the Tenth Circuit, arguing that Safeway and Kraft's presence in the district court did not require dismissal of respondents' appeal and that Safeway and Kraft were dispensable parties in any event.[4] Resp. Br. 47 n.10. Respondents now profess to have had a change of heart on this point—including on the purely factual question whether Safeway and Kraft are indeed dispensable parties. See *ibid.*

This Court should leave respondents' argument for the lower courts to address in the first instance. The Court of Appeals did not reach the question whether Safeway and Kraft's presence before the district court required dismissal of the appeal in this case, despite having requested briefing on that issue. See Pet. App. 4. Because this Court is "a court of review, not of first view," its ordinary practice is not to consider matters that were "not addressed by the Court of Appeals." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That practice makes particular sense where, as here, the issue is not independently worthy of this Court's review and its resolution may depend on facts not in the

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[4] Respondents' argument that the lack of diversity at time of removal and judgment necessitates dismissal is made even more puzzling by their agreement, in motion practice before this Court, that Americold Logistics LLC should be dismissed as a dispensable party and that doing so would allow this Court to reach the question presented here.

record (in this case, for example, whether Safeway and Kraft were or were not dispensable parties and whether respondents should be held to their earlier concession on that point, see Resp. Br. at 47 n.10). See, *e.g.*, *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975).

Nor does the fact that respondents' proposed alternative ground for affirmance concerns subject-matter jurisdiction mean that this Court must resolve it now. Although a determination of "subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). Here, because both the question presented and respondents' alternative ground for affirmance concern threshold jurisdictional issues, this Court may vacate the Court of Appeals' judgment and remand for further consideration of other issues (including the proposed alternative ground) without addressing other arguments as to why lack of jurisdiction may prevent a ruling on the merits. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("'[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.'"). Cf. *Carden*, 494 U.S. at 197 (declining to reach proposed alternative ground for affirmance as to jurisdictional question).

If the Court does reach respondents' proposed alternative ground for affirmance, the argument is meritless and should be rejected. Although it is generally true that complete diversity must be present at the time federal jurisdiction is invoked and at the time of judgment, see *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996), it is also well established that where an absence of complete diversity goes undetected through the time of judgment, it may be cured on appeal by the

appellate court's dismissal of a dispensable nondiverse party. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989); see also *Grupo Dataflux*, 541 U.S. at 572 (dismissal of a nondiverse party is a "method of curing a jurisdictional defect [that] had long been an exception to the time-of-filing rule"). And where, as in the case of Safeway and Kraft in this action, a party makes a "considered choice not to appeal" the district court's adverse judgment, the judgment becomes final as to that party and has the effect of removing the party from the proceedings, regardless of the outcome of another party's appeal. *Ackermann v. United States*, 340 U.S. 193, 198 (1950). It follows that where, as here, a nondiverse party (particularly a *dispensable* nondiverse party, as Americold believes the factual record in this case would show Safeway and Kraft to be) has chosen not to appeal the district court's judgment, that defect will not preclude the Court of Appeals from reaching the merits of an appeal involving the remaining parties, so long as the remaining parties satisfy the complete-diversity requirement. Article III does not mandate a contrary result, and "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 490 U.S. at 836.

CONCLUSION

For these reasons and those set forth in Americold's opening brief, the judgment of the Court of Appeals should be vacated and the case should be remanded.

Respectfully submitted,

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Supreme Court of the United States

AMERICOLD LOGISTICS, LLC, ET AL.,
Petitioners,

v.

CONAGRA FOODS, INC., ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICUS CURIAE SUPPORTING REVERSAL

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BRIEF FOR THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE AMICUS CURIAE

Amicus curiae The National Association of Real Estate Investment Trusts (NAREIT) is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses worldwide that own, operate, and finance income-producing properties, as well as firms and individuals that advise, study, and service those businesses.[1]

Many of NAREIT's members are, like petitioner Americold Realty Trust ("petitioner"), REITs organized under Title 8 of the Corporations and Associations Article of the Code of Maryland. And many of those REITs, unlike petitioner, are publicly traded—meaning that they have shareholders in all U.S. states, or nearly all. Adopting the Tenth Circuit's reasoning would treat those REITs as citizens of every one of those states for purposes of federal diversity jurisdiction. That would largely deprive those REITs of access to the federal courts sitting in diversity: they would be unable to remove actions to federal

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

court based on diversity, 28 U.S.C. § 1441(b)(2) (an action brought in state court in a state where any defendant is a citizen may not be removed to federal court based on diversity), and likely would not be able to establish even the minimal diversity required for removal of large class actions, *see* 28 U.S.C. § 1332(d)(2)(A). That treats REITs organized as trusts unfavorably compared to REITs organized as corporations, which are citizens of only one or two states. As the leading trade association representing REITs, including these publicly traded REITs organized as trusts, NAREIT has an important interest in ensuring that this Court rejects the Tenth Circuit's incorrect view.

In addition, NAREIT is uniquely well positioned to explain the history and nature of the particular business entity form at issue in this case, including the lack of any salient difference between a REIT organized as a trust under Maryland's Title 8 and a REIT organized as a corporation under the Maryland General Corporation Law.

SUMMARY OF ARGUMENT

Since the nineteenth century, this Court has recognized that entities possessing complete legal personality should be treated as citizens in their own right for diversity-jurisdiction purposes. Trusts organized under Maryland's Title 8 ("Maryland Trust REITs") possess all the hallmarks of complete legal personality. A Maryland Trust REIT like petitioner should thus be treated as having its own citizenship, as corporations are, rather than as taking on the citizenship of all its trustees and shareholders.

A Maryland Trust REIT has particular characteristics that make it materially identical to a corporation. It is a juridical entity newly created by statute, not derived from the common law. It owns property, sues, and is sued in its own name, not through its trustees. And its owners are not partners but shareholders, who all benefit from limited liability. Those characteristics also serve to distinguish this Court's cases refusing to extend citizenship-in-their-own-right status to entities like labor unions and partnerships. And to the extent that broad dicta in those cases can be read as precluding citizenship-in-their-own-right treatment even for entities like petitioner, this Court should disavow such a reading. This is not a purely statutory question: the concept of "citizenship" for diversity-jurisdiction purposes comes ultimately from the Constitution, and it is this Court's ultimate responsibility to interpret Article III.

Thus, while NAREIT agrees with petitioner that the judgment should be reversed, and that *if* petitioner is not entitled to be treated as a citizen in its own right it should have the citizenship only of its trustees, NAREIT believes that the correct approach to petitioner's citizenship need not refer to petitioner's "members" at all. Petitioner is a citizen in its own right.

ARGUMENT

This case involves not just a "trust," but a particular type of state-law entity, which this brief calls a "Maryland Trust REIT." Maryland is to REITs what Delaware is to general business corporations. About eighty percent of publicly traded REITs are orga-

nized under Maryland law. *See* James J. Hanks, Jr., *Federally Tax-Qualified Real Estate Investment Trusts Formed Under Maryland Law*, at 6 (2015) (Hanks), https://goo.gl/1MLNSX. And Maryland's Title 8 authorizes the creation of real estate investment trusts as a distinct type of entity that, as discussed in more detail below, resembles a corporation in all material ways.

This Court need not, and should not, announce a rule that applies to all trusts. Not all trusts share the same attributes relevant to diversity jurisdiction. And in the case of a Maryland Trust REIT, the relevant attributes are no different from those of a REIT organized as a corporation.[2] This Court should take due account of those attributes and hold that a Maryland Trust REIT is a citizen of Maryland and its principal place of business, just as a REIT organized as a Maryland corporation is.

In any event, the Court should answer the question presented in a way that gives Maryland Trust REITs a chance to access federal diversity jurisdiction, which is effectively impossible under the Tenth Circuit's approach. While this brief recommends an approach distinct from petitioners', both this brief and petitioners' brief explain why the Tenth Circuit's approach is incorrect and must be rejected.

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[2] Despite the name, not all REITs are organized as trusts. In fact, the majority of publicly traded REITs are organized under state law as corporations rather than as trusts—making the "T" in "REIT" something of a misnomer in those cases.

I. REITs Are Important to the U.S. Economy and Require the Protection That Diversity Jurisdiction Provides

Before determining the citizenship of a Maryland Trust REIT for diversity purposes, this Court should understand several key aspects of the governing law and the important role that REITs play in the U.S. economy. Congress promoted the formation of REITs as a way for small investors to participate in owning professionally managed and diversified real estate. As a result, many REITs today have publicly traded shares and millions of shareholders, and those shareholders may be located all over the country and, indeed, the world. Precisely because of the nature of their mission, REITs are potentially subject to suit anywhere they may own property, making the protections of diversity jurisdiction particularly important to them. That access to federal court would be impossible under any approach that requires ascertaining the citizenship of millions of shareholders who buy and sell ownership interests on public stock markets, with millions of shares changing hands each day.

A. Congress Authorized the REIT as a Vehicle for Small Investors to Own Real Estate

Although REITs are organized under state law rather than federal law, the modern REIT owes its existence to tax legislation that Congress adopted in 1960. *See* Act of Sept. 14, 1960, Pub. L. No. 86-779, § 10, 74 Stat. 998, 1003–09 (codified as amended at 26 U.S.C. §§ 856–859). This federal legislation did not create any legal entity; rather, it provided for a

special set of tax rules to cover businesses that complied with certain detailed qualification requirements. *See id.*

Congress patterned the REIT rules after the tax rules governing mutual funds, authorized two decades earlier. *See generally* Internal Revenue Code of 1954, Pub. L. No. 83-591, §§ 851–855, 68A Stat. 3, 268–74. As the House Committee on Ways and Means explained, the goal of creating a similar tax regime for REITs was to provide a means "whereby small investors can secure advantages normally available only to those with larger resources" in connection with real estate investment. H.R. Rep. No. 86-2020, at 3 (1960). These beneficial characteristics included "greater diversification of investment," "expert investment counsel," and the means of "collectively financing projects which the investors could not undertake singly." *Id.* at 3–4. Without legislation to create a model for collective real estate investment akin to mutual funds, only a select few would have the opportunity to gain from the three most fundamental benefits of real estate investment (aside from owner-occupied housing): current income, long-term capital preservation and appreciation, and investment diversification.

In general, the federal rules require that a REIT's real estate investment be undertaken for the longer term, that taxable income result from real estate-related investment, that at least 90% of the taxable income be distributed annually to the REIT's shareholders, and that the REIT be taxable as a corporation. 26 U.S.C. §§ 856(a)(3), 857(a)(1); *see generally id.* §§ 856–859.

Because of the requirement to distribute at least 90% of taxable income, REITs are uniquely unable to retain appreciable amounts of their earnings for use toward future investment. REITs must thus regularly return to the capital markets to fund new investment, thereby remaining disciplined in their use of capital and subject to the scrutiny of investors and the public. Unlike pass-through entities, such as limited liability companies that elect to be taxed as partnerships, REITs also are not generally permitted to pass through tax losses or tax credits to their shareholders.

By complying with these and other burdensome requirements, a REIT allows its shareholders to avoid double taxation to the extent a REIT distributes its income. The REIT deducts from its taxable income the dividends it pays to its shareholders when completing its federal corporate-income-tax return. *See id.* §§ 561, 857(b)(2). The dividends REITs pay are generally taxable to each shareholder at the shareholder's ordinary income-tax rate. *See id.* § 857(c). In 2014, SEC-registered REITs distributed $47 billion to shareholders.

B. Because REITs Provide Investment Opportunities for Millions of Small Investors, Their Ownership Is Often Highly Dispersed and They Are Exposed to Litigation Far from Home

Today REITs play a key role in the United States economy. Many REITs are publicly traded, meaning that they have a wide and constantly changing set of shareholders—and making the Tenth Circuit's rule

deeply problematic. And REITs hold significant amounts of real estate, exposing them to litigation far from home.

1. Petitioner is a private REIT, but many REITs, including many Maryland Trust REITs, are listed for trading on major stock exchanges. Other REITs are "Public Non-Listed REITs," which are registered with the SEC but whose shares are not listed on an exchange.

Listed REITs have billions of outstanding shares, likely owned by citizens of every state. In addition, even privately held REITs must have at least 100 shareholders. 26 U.S.C. § 856(a)(5). And the shares must be transferable. *Id.* § 856(a)(2).

The 238 REITs that are currently listed on U.S. stock exchanges have an equity market capitalization of nearly $1 trillion and help support 1.2 million jobs in the U.S. each year, both through their own operations and operations of the businesses that occupy their properties. In addition to the REIT rules, these listed REITs are subject to regulation by the SEC as well as stock exchange listing requirements. *See* Hanks, *supra*, at 10–11.

2. Today's REITs mostly specialize in owning real estate. "Equity REITs" primarily own, and often operate, income-producing properties, including apartment buildings, office buildings, data centers, hospitals, hotels, industrial facilities, telecommunications towers, shopping centers, and timberlands. Equity REITs are estimated to own more than $1.4 trillion of real estate in the United States, including

more than 120,000 properties in all 50 states plus the District of Columbia and Puerto Rico, and to account for 15–20% of the total commercial real estate market. By contrast, "mortgage REITs" primarily invest in mortgages and mortgage-backed securities, providing financing for residential and commercial properties. Mortgage REITs hold over $280 billion in residential mortgages, financing millions of homes. *See* Fed. Reserve Bd. of Governors, *Financial Accounts of the U.S.: Second Quarter 2015*, at 103.

The U.S. REIT industry—primarily through the elected burden of mandatory distribution of taxable income—has helped to foster growing interest in long-term, income-oriented real estate investment in the U.S. and, increasingly, around the world. The transparency of public REITs, together with the disciplined use of capital encouraged by the REIT rules and the public capital markets, has benefited all participants in the real-estate sector, including institutional and individual investors; providers of credit; local, state and federal governments; and regulators. *See, e.g.*, Frank Packer et al., *Securitization and the Supply Cycle: Evidence from the REIT Market*, 39 J. Portfolio Mgmt. 134, 136 (2013). REITs also make significant contributions to the economic growth and stability of the country through their development and redevelopment projects.

As a result of this track record, REITs have become widely accepted in today's investment landscape. For example, an estimated 70 million Americans directly or indirectly own REITs through their pension funds and other retirement-savings and investment accounts, including more than half a million defined-

contribution plans such as 401(k) plans. There are approximately 300 mutual funds and exchange traded funds dedicated to REITs and real estate stocks sponsored by companies like Vanguard, Fidelity, and T. Rowe Price. Further, REITs are in the vast majority of target-date mutual funds, the fastest-growing retail investment default option in 401(k) and other retirement plans.

Because so many REITs are in the business of owning and operating real property, they can at times be magnets for meritless litigation asserting state-law claims. When such claims are filed in state court, REITs face the same danger of local prejudice as large, out-of-state corporate litigants. *See Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 35–36 (1957) (statement of Judge Albert B. Maris, U.S. Court of Appeals for the Third Circuit, Chairman, Comm. on Revision of the Laws, U.S. Judicial Conference) (testifying that diversity jurisdiction protects, among others, businesses sued "in States remote from their headquarters where they don't know the local people"). But because many REITs—particularly publicly traded REITs—have shareholders living in nearly every U.S. state, the Tenth Circuit's rule would effectively deprive REITs organized as trusts of diversity jurisdiction in all, or nearly all, cases. As discussed below, this Court's precedent does not require such an extreme result.

II. Maryland Trust REITs Are Nearly Identical to Maryland Corporations and Should Be Treated as Such for Diversity-Jurisdiction Purposes

The Tenth Circuit held that there was no diversity jurisdiction based on its view that petitioner Americold Realty Trust was "a trust," and that "the citizenship of a trust is determined by examining the citizenship 'of all the entity's members.'" Pet. App. 2 (quoting *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990)). Only in a footnote, quoting from the notice of removal, did the Tenth Circuit even mention what type of entity petitioner in fact is. *See id.* at 3 n.2.

Petitioner is not just any trust. Like many other REITs, it is an entity organized under Title 8 ("Real Estate Investment Trusts") of the Corporations and Associations Article of the Maryland Code—a "Maryland Trust REIT." Its citizenship should therefore turn on the characteristics of a Maryland Trust REIT, not on the general label "trust."

Under the correct analysis, a Maryland Trust REIT is a citizen of Maryland and of its principal place of business. This Court's cases (which Congress has presumptively ratified in the current diversity statute) establish that the entity itself has its own citizenship when it is a separate "juridical person"; created by state law and given its own "birth certificate"; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board.

A Maryland Trust REIT passes that test. Congress affirmatively structured the original REIT rules so

that REITs would be as much like corporations as possible—but could not label themselves corporations. Maryland responded by adopting what is now Title 8, the law under which Maryland Trust REITs are organized. And except for the label, Maryland Trust REITs are identical to Maryland corporations in every material way. This case thus involves an entity that is substantively much closer to a corporation than were any of the parties in this Court's previous cases about citizenship for diversity purposes. The arbitrary difference between the labels should not change this Court's analysis.

A. The Maryland Trust REIT Entity Is Identical to a Corporation in All Respects Material to the Question Before This Court

The Maryland Trust REIT has "trust" in its name, but it more closely resembles a Maryland corporation than any "traditional" type of trust. In a traditional trust, and even a traditional business trust, the trustees hold legal title to the trust corpus and manage it on behalf of the beneficiaries. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 459 (1980) (describing a business trust organized under Massachusetts law). A Maryland Trust REIT, in contrast, is—like a corporation—a wholly "separate legal entity." Md. Code Ann., Corps. & Ass'ns § 8-102(2). As a result, it is the Maryland Trust REIT entity itself, rather than its trustees, that purchases and holds title to land, and that can, among other things, "[s]ue, be sued, complain, and defend in all courts," and "[m]ake contracts, incur liabilities, and borrow money." *Id.* § 8-301; *see also* Hanks, *supra*, at 10 (explaining that a Maryland Trust REIT "may engage in activities

in its own name and not in the name of its directors, trustees, stockholders, or shareholders"). As a result, a Maryland Trust REIT "is as much a separate legal person under Maryland law as a corporation." James J. Hanks, Jr., *Maryland Corporation Law* § 17.1, at 444 (Supp. 2015).

Also like a Maryland corporation, a Maryland Trust REIT is created by filing governing documents as a public record. *See* Md. Code Ann., Corps. & Ass'ns § 8-201(1); *see also id.* § 2-102 (corporation). Once formed, a Maryland Trust REIT has "perpetual existence." *Id.* § 8-301(1). If there are grounds to terminate a Maryland Trust REIT, the Attorney General may pursue dissolution exactly as he does for corporations, through an action brought "in the matter and on the grounds provided in" the corporation statute. *Id.* § 8-502(c).

Moreover, a Maryland Trust REIT is governed and managed almost identically to a corporation. *See* Hanks, *supra*, at 7–10 & App. Like corporations, Maryland Trust REITs must be governed by boards their shareholders elect. Md. Code Ann., Corps. & Ass'ns § 8-202(b)(1)(v). The members of a Maryland Trust REIT's board are called "trustees" rather than directors, but—terminology aside—their role is identical to that of corporate directors. *See id.*, Hanks, *supra*, at 8.

Shareholders in Maryland Trust REITs ("beneficiaries") occupy the same position as corporate shareholders. They have "the same right to inspect the records of the real estate investment trust as has a stockholder in a corporation." Md. Code Ann., Corps. & Ass'ns § 8-402(b)(2). They are not liable for

debts of the Maryland Trust REIT. *See id.* § 8-601; Md. Code Ann., Cts. & Jud. Proc. § 5-419(b). And if they believe that a trustee has breached his or her fiduciary duties to the entity, Maryland Trust REIT shareholders, like corporate shareholders, may enforce those duties only through a derivative suit. Hanks, *supra*, at 10.

Finally, many Maryland Trust REITs are listed for trading on major stock exchanges, particularly the New York Stock Exchange (NYSE). Stock exchanges apply the same listing criteria to Maryland Trust REITs and Maryland corporations. *See, e.g.*, Rule 5005(a)(6), *NASDAQ Stock Market Rules*, NASDAQ, http://nasdaq.cchwallstreet.com/ (last visited Nov. 11, 2015) (providing that "company" includes an "issuer that is not incorporated"); Rule 303A.00, *NYSE Listed Company Manual*, NYSE, http://nysemanual.nyse.com (last visited Nov. 24, 2015). Thus, for example, the exchanges make *both* types of entity subject to the same extensive disclosure, operational, and corporate-governance rules, including rules for director elections and the requirement that a majority of the board be comprised of independent directors. *See, e.g.*, Rules 303A.00 to 315, *NYSE Listed Company Manual*, *supra*. Major stock indices like those of Standard & Poors likewise make no distinction between corporate REITs and Maryland Trust REITs. *See REITs in S&P Indexes*, REIT.com, https://www.reit.com/investing/investor-resources/reit-directory/reits-sp-indexes (last visited Nov. 21, 2015). Nor do proxy advisors—companies that advise shareholders on corporate-governance issues—make any such distinction. A shareholder buying a share of a publicly traded REIT is thus unlikely to

perceive any difference between a Maryland Trust REIT and a REIT organized as a Maryland corporation.

B. The Maryland Trust REIT Is Called a Trust for Historical Reasons

The Maryland Trust REIT's packaging of the substantive structure of a corporation into an entity called a "trust" is an artifact of regulatory history. When Congress first authorized REITs as eligible for favorable tax treatment, it required that businesses classified as REITs be "unincorporated trust[s]" or "unincorporated association[s]" that were managed by trustees and with "beneficial ownership evidenced by transferrable shares" or certificates. 26 U.S.C. § 856(a) (1964). Congress also required, however, that for purposes of federal taxation, a REIT be an entity that would be "taxable as a domestic corporation" if it were not for the REIT rules. *Id.* § 856(a)(3) (1964). In other words, Congress wanted something that would be a corporation in all but name.[3]

Three years after Congress passed the REIT rules, the General Assembly of Maryland created the Maryland Trust REIT as a new type of business entity tailored to meet the requirements of the federal REIT rules. Consistent with the new federal REIT tax provisions, the Maryland statute provided that the

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[3] This framework was modeled after the Massachusetts business trust, a type of entity that was popular at the time for mutual funds and real estate investment. *See* H.R. Rep. No. 86-2020, at 5; Hanks, *supra*, at 3; *see also Morrissey v. Comm'r*, 296 U.S. 344, 359-60 (1935) (holding that business trusts were subject to the corporate income tax as "associations").

new form of entity would be called a "trust" and not a corporation. But it also provided more statutory structure than a traditional Massachusetts business trust, *see* note 3, *supra*, including governance mechanisms and powers that, as discussed, are very similar to those applicable to Maryland corporations. *See* Act of Mar. 14, 1963, 1963 Md. Laws 178; *see also* Hanks, *supra*, at 7–10 & App. The Maryland Trust REIT statute, as amended, is codified in Title 8 of the Corporations and Associations Article of the Maryland Code. In the years after Maryland adopted Title 8, the Maryland Trust REIT became by far the dominant form of organization for REITs nationwide. *See* Hanks, *supra*, at 5–6.

In 1976, Congress amended the REIT rules to allow, for the first time, entities organized as corporations to be treated as REITs at the federal level. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1604(f), 90 Stat. 1520, 1751 (subsection entitled "Real Estate Investment Trusts May Be Incorporated") (codified at 26 U.S.C. § 856(a) (2012)). The Senate Committee on Finance explained that the prohibition on corporate REITs had "caused operating problems for some REITs under State law," S. Rep. No. 94-938, at 475 (1976), presumably in states that had not created a custom-built form of entity like the Maryland Trust REIT. After Congress lifted that prohibition, REITs gradually began to migrate to Maryland corporations (or occasionally Delaware corporations, or other business forms for state and local tax reasons). *See*

Hanks, *supra*, at 6. But many REITs today remain organized as Maryland Trust REITs like petitioner.[4]

C. Under This Court's Cases, a Maryland Trust REIT Is a Distinct Entity with Its Own Citizenship, Just as a Corporation Is.

For more than 150 years, this Court has treated corporations as having their own citizenship, not citizenship derived from their shareholders. A Maryland Trust REIT is—by design—materially identical to a Maryland corporation, and the Maryland Trust REIT likewise should have its own citizenship. While this Court has been reluctant to treat *other* artificial entities as "citizens" in their own right for purposes of Article III, Section 2, or the diversity statute, 28 U.S.C. § 1332, those decisions did not consider any entity as similar to a corporation as the Maryland Trust REIT is. As explained above, the Maryland Trust REIT was specifically constructed to comply with a federal law calling for a form of entity that would be a corporation in all but name.

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[4] A handful of REITs are organized as trusts under the laws of states other than Maryland that have their own statutory "real estate investment trust" entities, which differ to varying degrees from the Maryland Trust REIT entity. *See, e.g.*, N.D. Cent. Code §§ 10-34-01 to -09; Ohio Rev. Code Ann. §§ 1747.01–.99; Tex. Bus. Orgs. Code Ann. §§ 200.001–.503. Because petitioner is a Maryland Trust REIT, and because Maryland Trust REITs are by far the most common type of trust REIT, Hanks, *supra*, at 6, this brief focuses on Maryland Trust REITs. But a similar analysis is likely to apply to REITs organized under other states' "real estate investment trust" provisions.

1. Corporations have not been treated as deriving citizenship from their shareholders since the early 19th century. The Court briefly tried the agglomeration-of-shareholders approach, but overruled it in 1844, and since that time corporations have always had their own citizenship. Congress codified that result, with a slight modification, in Section 1332(c)(1).

The Court at first was reluctant to treat a corporation as an entity with its own citizenship. In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), *overruled in part by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 554–55 (1844) (*Letson*), the Court held that a corporation was an "invisible, intangible, and artificial being" and a "mere legal entity" and therefore was "certainly not a citizen." *Id.* at 86. The Court explained that "the corporate name represents persons who are members of the corporation," and those "real persons who come into court under their corporate name" were entitled to invoke diversity jurisdiction in a case that qualified for it. *Id.* at 91. But because the pertinent "citizens" were those "real persons" rather than the corporation itself, *Deveaux* held that there was diversity jurisdiction over an action involving a corporation only if every member of the corporation was diverse from every opposing party. *Id.* at 91–92.

Significantly, however, the Court soon thought better of *Deveaux*'s approach to corporate citizenship. In *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844), the Court overruled *Deveaux* and held that for purposes of diversity jurisdiction under "the Constitution and the laws of the United States," *id.* at 552, 555, a corporation was a citizen only of its state of incorporation. The Court

explained that "the corporators as individuals are not defendants in the suit," and so it could "not see how [jurisdiction] can be defeated by some of the members, who cannot be sued, residing in a different state." *Id.* at 554. Instead, the Court held that a corporation "is to be deemed to all intents and purposes as a person capable of being treated as a citizen" of its state of incorporation for diversity-jurisdiction purposes. *Id.* at 558. The Court then reaffirmed that result in *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 325–26, 328–29 (1853).[5]

In 1958, Congress amended Section 1332 to give corporations an additional state of citizenship. *See* 28 U.S.C. § 1332(c). In doing so, Congress merely "codified the courts' traditional place of incorporation test" for corporations and tweaked it by adding a second state of citizenship—the "principal place of business" in addition to the state of incorporation. *Hertz Corp. v. Friend*, 559 U.S. 77, 88 (2010). The passage of Section 1332(c) thus left intact *Letson*'s reasoning for according independent citizenship to corporations.

2. The Court has never addressed the citizenship of an entity as similar to a corporation as the Mary-

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[5] The Court in *Marshall* applied a different rationale from the rationale in *Letson*: it created an irrebuttable (and fictional) presumption that the shareholders of a corporation were all citizens of the corporation's state of incorporation. *See Marshall*, 57 U.S. (16 How.) at 328–29. As this Court later pointed out, however, "*Marshall*'s fictional approach appears to have been abandoned," because "[l]ater cases revert to the formulation of [*Letson*] that the corporation has its own citizenship." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 194 n.3 (1990).

land Trust REIT is. The closest the Court has come was in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), involving a civil-law entity, the *sociedad en comandita*. This Court held in *Russell & Co.* that the *sociedad en comandita* was to be treated as a corporation for diversity-jurisdiction purposes. *Id.* at 482. The Court explained that while the "tradition of the common law is to treat as legal persons only incorporated groups," the "tradition of" Puerto Rico's civil-law legal system was different. *Id.* at 480–81. "In the law of its creation, the sociedad is consistently regarded as a juridical person." *Id.* at 481. Indeed, the *sociedad*'s "personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the sociedad has a different status for purposes of federal jurisdiction than a corporation organized under that law." *Id.* at 482.

A Maryland Trust REIT enjoys each of the characteristics that the Court emphasized in *Russell & Co.* A *sociedad* "may contract, own property, and transact business," and may "sue and be sued in its own name and right." *Id.* at 481. So may a Maryland Trust REIT. Md. Code Ann., Corps. & Ass'ns § 8-301(2), (4); pages 12-14, *supra*. A *sociedad* is created by a publicly filed document, *Russell & Co.*, 288 U.S. at 481, just like a Maryland Trust REIT, Md. Code Ann., Corps. & Ass'ns § 8-102(1).[6]

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[6] The Court also mentioned that the members of a *sociedad* may not intervene as defendants in a suit against the entity. *Russell & Co.*, 288 U.S. at 481. Maryland does not appear to have addressed that question explicitly with respect to Maryland Trust REITs. *Cf.* Md. R. 2-214 (governing intervention in general).

Indeed, in many ways, a Maryland Trust REIT is more akin to a corporation than a *sociedad* is. A *sociedad* provides limited liability only with respect to some partners; others face unlimited liability. *Russell & Co.*, 288 U.S. at 481. In contrast, all shareholders of a Maryland Trust REIT have limited liability, as in a corporation. *See* Md. Code Ann., Corps. & Ass'ns § 8–601; Md. Code Ann., Cts. & Jud. Proc. § 5–419(b). A *sociedad may* vest management in designated managers, and *may* endure indefinitely, if its governing documents so provide, *Russell & Co.*, 288 U.S. at 481, a Maryland Trust REIT possesses both those features by default. Md. Code Ann., Corps. & Ass'ns §§ 8-202(b)(1)(v), 8-301(1). In sum, there is no characteristic of a *sociedad* that would justify this Court's treating it as a corporation, but denying such treatment to a Maryland Trust REIT.

Two of this Court's decisions—discussed in more detail below—do raise another possible distinction of *Russell & Co.*, but that distinction is likewise inapplicable to Maryland Trust REITs. *See Carden*, 494 U.S. at 189–90; *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151–52 (1965) (*R.H. Bouligny*). The Court emphasized that *Russell & Co.* involved the problem of "fitting an exotic creation of the civil law into a federal scheme which knew it not." *R.H. Bouligny*, 382 U.S. at 151. Building on that statement, *Carden* explained that "at least common-law entities" were not entitled to corporate treatment under *R.H. Bouligny*. 494 U.S. at 190.

Significantly, however, the Maryland Trust REIT is *not* a common-law entity, nor even—unlike the limited partnership in *Carden*—a statutory modifica-

tion of a common-law entity. As explained above, notwithstanding the word "trust" in its name, the Maryland Trust REIT is entirely a creature of statute. *See also* Hanks, *supra*, at 5. The Maryland legislature created it to fit the mold Congress had cast in 1960: an entity providing the benefits of corporate status, including detailed statutory governance requirements not applicable to common-law entities like partnerships, without violating the (since-repealed) requirement in federal law that REITs be "unincorporated." 26 U.S.C. § 856 (1964); *see* Hanks, *supra*, at 5.

This Court therefore faces in this case a problem that is very similar to the problem it faced in *Russell & Co.*—how to fit a novel statutory creation into "a federal scheme which kn[ows] it not." 382 U.S. at 151. As in *Russell & Co.*, the Court should solve that problem by turning to the law that created the entity. And, as explained above, Maryland law gives "content to [its] declaration that the" Maryland Trust REIT "is a juridical person" in every way that Puerto Rico law did with respect to the *sociedad*, *id.* at 482, and more. *See Maryland Corporation Law*, *supra*, § 17.1, at 444. The Court should therefore hold that the Maryland Trust REIT is a corporation for diversity-jurisdiction purposes.

3. This Court has, on several occasions, declined to extend the rule of *Letson* to artificial entities other than corporations and the *sociedad en comandita*. None of those cases, however, rested on reasoning relevant to a Maryland Trust REIT.

a. The first case to suggest a different rule for unincorporated entities did so only in dicta, as the case

actually did involve a corporate defendant. *See Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 405 (1855). The Court provided no reasoning; it simply stated without explanation that it "d[id] not hold, that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the constitution" for diversity purposes. *Id.*

In *Chapman v. Barney*, 129 U.S. 677 (1889), the Court then held that an unincorporated joint-stock company organized under New York law was not a citizen of its state of organization. *Id.* at 682. Addressing jurisdiction *sua sponte*, the Court held that a joint-stock company is not a citizen of New York in its own right, and stated more broadly in dicta that the company "cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation." *Id.* The Court described the joint-stock company as "a mere partnership." *Id.*

Joint-stock companies lacked capacity to sue in their own right; the plaintiff company had actually filed suit "in the name of its president." *Id.* at 679, 682. Similarly, the joint-stock company did not stand between its shareholders and its creditors in the way that a corporation does. In overruling *Deveaux*, *Letson* had focused on the fact that the members of the corporation were "not defendants in the suit" and "[could not] be sued." *Letson*, 43 U.S. at 554. But unlike corporate shareholders, shareholders in a nineteenth century New York joint-stock company did not did not benefit from limited liability. *See People ex rel. Nat'l Express Co. v. Coleman*, 31 N.E. 96, 97 (N.Y. 1892). As the New York Court

of Appeals explained (a few years after *Campbell*, but describing existing law), "the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a jointstock company leaves the individual rights and liabilities unimpaired and in full force." *Id.*

Thus, there was ample reason not to apply the holdings of *Letson* and *Marshall* to a joint stock company, which lacked many of the pertinent aspects of a corporation. The Court did not explain the statement in dicta that *only* a corporation could have its own state citizenship; it certainly did not ground that broad statement in the reasoning of *Letson* or *Marshall*, and indeed, *Chapman* did not even cite *Letson*, *Marshall*, or *Lafayette Insurance*. *See id.* at 682.

In contrast, the Maryland Trust REIT is precisely like a corporation in all relevant respects. Maryland law provides that shareholders are not liable for the Maryland Trust REIT's debts. *See* Md. Code Ann., Corps. & Ass'ns § 8-601; Md. Code Ann., Cts. & Jud. Proc. § 5-419(b). It also explicitly provides that a Maryland Trust REIT is a "separate legal entity." Md. Code Ann., Corps. & Ass'ns §§ 8-102(2). The distinctions that justified *Chapman*'s refusal to apply *Letson* to a joint stock company are therefore wholly inapplicable to a Maryland Trust REIT like petitioner.

b. The Court again addressed entity citizenship in two cases involving limited partnerships. In the first, *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), the Court pointed out that the plaintiff, a "limited partnership association" orga-

nized under a Pennsylvania statute, was not a corporation. *Id.* at 454. The Court therefore explained that under *Chapman* and *Lafayette Insurance*, diversity jurisdiction depended on "the citizenship of the several persons composing such association." *Id.* at 454. That was so even though there were several similarities between a "limited partnership association" and a "corporation" as a matter of Pennsylvania law, such as capacity to sue. *See id.* at 455–57 The Court offered little explanation for that conclusion; it simply stated that the similarities were "not a sufficient reason for regarding [the limited partnership association] as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended." *Id.* at 457. The Court then adhered to that result in *Carden*, again rejecting the argument that a limited partnership—this time, under Arizona law—was a corporation for diversity-jurisdiction purposes. 494 U.S. at 187-90.

Despite the Court's lack of explanation, however, there were again significant differences between a "limited partnership association" and a corporation as a matter of Pennsylvania law that perhaps justified the distinction in *Great Southern*. As the Supreme Court of Pennsylvania had explained, a limited partnership association possessed "*some of the characteristics* of a partnership and some of a corporation." *Hill v. Stetler*, 17 A. 887 (Pa. 1889) (emphasis added). For example, unlike corporations, which at the time required the issuance of "letters patent" by the governor, the creators of the limited partnership association were "trusted by the law to certify directly to the public without the intervening agency of the governor, and thus to give life to their own

creature." *Id.* It was therefore not clear in 1900, when *Great Southern* was decided, whether the Pennsylvania limited partnership association possessed the complete legal personality of a corporation. Likewise, in *Carden*, there was no argument that the limited partnership at issue possessed complete legal personality in the way that a corporation does. *See* Br. of Resp't at 19–31, *Carden* (No. 88-1476). Rather, the argument in *Carden* focused on similarities between shareholders and limited partners, rather than between the legal treatment of the entities themselves. *See id.*

A Maryland Trust REIT, however, does possess complete legal personality. It is formed in the same manner as a Maryland corporation—by properly filing a document with a state agency in accordance with the requirements of law. *See* Md. Code Ann., Corps. & Ass'ns § 8-102(1). Maryland law is explicit that a Maryland Trust REIT has separate legal existence. *Id.* § 8-102(2). And, moreover, a Maryland Trust REIT is governed in precisely the same manner as a Maryland corporation—by an elected board owing duties enforceable only by the Maryland Trust REIT itself or in a derivative lawsuit. *Id.* § 8-202(b)(1)(v); Hanks, *supra*, at 10.

c. Separate legal personhood was the decisive factor in *R.H. Bouligny*, in which the Court refused to treat a labor union as a corporation for diversity-jurisdiction purposes. The Court acknowledged arguments that "many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure." 382 U.S. at 150. But the Court held that corporations (and the *sociedad* in *Russell & Co.*) are "juridical

person[s]," whereas labor unions are not, absent a change in federal law. *Id.* at 150–51 (quoting *Russell & Co.*, 288 U.S. at 480-81).

This Court in *R.H. Bouligny* thus characterized its cases as turning on whether an entity was "endowed with a birth certificate," and explained that labor unions were not so endowed. *Id.* at 149. And Maryland Trust REITs *are* "endowed with a birth certificate." *See* Md. Code Ann., Corps. & Ass'ns § 8-102(1). Unlike in *R.H. Bouligny*, the argument here is not just a functional one. Whereas the labor union did not argue that it was a juridical person, but rather that the distinction should not matter, the question here is whether the Maryland Trust REIT itself *is* a "juridical person" entitled to the same citizenship as a corporation. For the reasons given above, the Court should hold that it is.

III. If This Court's Precedent Reads the Constitution to Require an Arbitrary Distinction Between Maryland Trust REITs and Maryland Corporations, the Court Should Overrule It

As discussed above, there is broad language in some of this Court's precedent that courts have read to foreclose corporate treatment for any formally "unincorporated" entity other than the *sociedad en comandita*. For the reasons just given, this language should not be read to govern the determination of citizenship status for a statutory entity as similar to a corporation as the Maryland Trust REIT. Rather, *Russell & Co.* sets out the governing rule. But if this Court disagrees, then it should re-examine the arbitrary distinction among essentially indistinguishable

legal persons. This is not an area in which the Court can cite statutory *stare decisis* and count on Congress to fix the problem. Rather, there is a real risk that this Court's decision will be read to rest on the *constitutional* term "citizen" as well as the statutory one—and on that reading, the Court would be lowering into place a constitutional ceiling that Congress could not lift. The Court should do what it did in *Letson* and adopt the correct test for citizenship of an entity like a Maryland Trust REIT, rather than adhere to the erroneous distinction between corporations and the *sociedad en comandita*, on the one hand, and everything else on the other.

The Court has recognized that such a distinction, rigidly adhered to, would be arbitrary. In *R.H. Bouligny*, the Court saw "considerable merit" and "force" to the argument that the distinction between corporations and unincorporated associations was "artificial and unreal," because "many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure." 382 U.S. at 149–51. Similarly, in *Carden*, the Court said that its approach "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." 494 U.S. at 196. The Court went on: "Arkoma is undoubtedly correct that limited partnerships are functionally similar to 'other types of organizations that have access to federal courts,' and is perhaps correct that '[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment'" to corporations. *Id.* (quoting Br. for Resp't, *Carden*, at 33).

If those distinctions were arbitrary, any distinction between a corporation and a Maryland Trust REIT would be even more so. As explained above, the Maryland Trust REIT is not merely "functionally similar" to a Maryland corporation—under Maryland law, Maryland Trust REITs are also *legally* nearly identical to Maryland corporations. Notwithstanding some differences in terminology, the legal structure and duties imposed on the Maryland Trust REIT form are the same as those imposed on the Maryland corporation, and the two have equivalent legal personality. *See* Hanks, *supra*, at 10.

The Court's response to its recognition of problems with its precedent distinguishing corporations from other entities has been to direct all complaints to Congress. For instance, in *Carden*, the Court noted that Congress had addressed corporations but not other entities in Section 1332(c), and it said that adjusting diversity jurisdiction would be "performed more legitimately by Congress than by courts." 494 U.S. at 197. Likewise, in *R.H. Bouligny*, the Court held that arguments about the arbitrary nature of the diversity rules were "addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at 150–51.

But as applied to Maryland Trust REITs, such a response would be inadequate, for two reasons. First, as laid out above, it was the Court, not Congress, that created the present distinction between corporations and unincorporated entities—Congress in 18 U.S.C. § 1332(c) merely codified the traditional approach to corporate citizenship, with a tweak (one

extra state of citizenship for corporations). *See Hertz Corp.*, 559 U.S. at 88. That does not suggest that Congress adopted a strict corporations-*only* rule—which would have required statutorily overruling this Court's decision in *Russell & Co.*, a result no court has adopted. *See, e.g., Luce & Co., S. en C. v. Alimentos Borinquenos, S.A.*, 276 F Supp. 94 (D.P.R. 1967).[7]

Second, and more significant, Congress's power to adjust diversity jurisdiction is subject to the constitutional ceiling imposed by Article III, Section 2. And that constitutional ceiling is itself at least potentially affected by this Court's entity-citizenship precedent. Specifically, Article III, Section 2 requires at least "minimal diversity," which means that "any two adverse parties are not co-citizens"—

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[7] Moreover, the legislative history of Section 1332(c) confirms that Congress was concerned with two things: the volume of corporate litigation in the federal courts, and the "evil" of allowing a "local institution, engaged in a local business and in many cases locally owned, to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State." H.R. Rep. No. 85-1706, at 2, 4 (1958); S. Rep. No. 85-1830 at 2, 4 (1958) (same); *see Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 523 (1928), *superseded*, 28 U.S.C. § 1332(c). Neither of those problems implicated non-corporate entities. And so it is not surprising that no reference at all was made to non-corporate entities in the committee hearings, committee reports, and floor debates on Section 1332(c). *See Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. (1957); 104 Cong. Rec. 12,683–690, 13,794 (1958). Thus, the legislative history likewise does not suggest that Congress has ratified an arbitrary distinction between corporations and non-corporate entities.

i.e., there is at least one plaintiff diverse from one defendant. *E.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). Congress cannot authorize diversity jurisdiction over suits that do not meet that constitutional requirement. *See Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800). A holding that a Maryland Trust REIT is a "citizen" everywhere its shareholders live could thus easily be read as a *constitutional* holding as well as a statutory one—a holding Congress could not overrule.

Congress faced no such problem with respect to 28 U.S.C. § 1332(c), because the statute operated to *reduce* diversity jurisdiction below the ceiling this Court had set in *Letson* and *Marshall*. *See Marshall*, 57 U.S. at 325. By adding an additional state of citizenship, Section 1332(c) reduced the number of cases over which the federal courts had jurisdiction. Indeed, Congress expressly considered the constitutionality of Section 1332(c) under Article III, Section 2, and concluded that it was constitutional precisely because the amendment served to withdraw from the courts diversity jurisdiction that the courts had held was authorized. *See* 104 Cong. Rec. 12,686–87 (1958).

In contrast, if this Court holds that Maryland Trust REITs are "citizens" of every state where their shareholders are citizens, then Congress, to fix the problem, would need to *expand* diversity jurisdiction from the level authorized by this Court. To the extent that the Court construes the term "citizens" for constitutional purposes as well as statutory ones, Congress might doubt that such a fix would be constitutionally possible. *Compare Lafayette Ins. Co.*, 59 U.S. (18 How.) at 405 (in dicta, seeming to state that

the distinction between corporations and unincorporated entities is a construction of "the meaning of the constitution"), *with Chapman*, 129 U.S. at 682 (referring only to "the meaning of the statutes regulating jurisdiction"). Congress might fear that this Court's precedent had made suits involving Maryland Trust REITs akin to suits between aliens—*i.e.*, even if Congress were to grant diversity jurisdiction by amending Section 1332(c) to explicitly cover Maryland Trust REITs, "the legislative power of conferring jurisdiction on the federal Courts" might not extend to such a grant. *Mossman*, 4 U.S. (4 Dall.) at 14.

For that reason, if the Court believes that the distinction it has previously drawn between corporations and certain unincorporated entities is not only unexplained but unjustified—as the Court itself said in both *R.H. Bouligny* and *Carden*—then the Court should not worsen the error by extending it to the even-more-corporation-like Maryland Trust REIT and leaving the resulting situation to Congress to fix. Rather, the Court should itself adopt a more reasonable approach to unincorporated entity citizenship that considers the extent to which the entity at issue is a complete juridical person under the law that creates it, along the lines of *Russell & Co.*, 288 U.S. 476. And as explained above, such an approach would ineluctably conclude that a Maryland Trust REIT is identical to a Maryland corporation in every material way.[8]

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[8] If the Court is unwilling to adopt this approach, it should still, at a minimum, make explicit what it necessarily implied in *R.H. Bouligny* and *Carden* by suggesting that Congress fix

IV. If the Court Does Treat Maryland Trust REITs Differently from Maryland Corporations, It Should Hold That Only the Trustees' Citizenship Is Relevant

If the Court does conclude that a Maryland Trust REIT's citizenship is the citizenship of each of its "members," Carden, 494 U.S. at 192, it should still reverse the Tenth Circuit and hold that a Maryland Trust REIT's "members" consist solely of its trustees, and not of its shareholders. *See* Pet. Br. 23–26. Doing so will better reflect the business realities of the Maryland Trust REIT entity and avoid artificially treating Maryland Trust REITs as citizens of states to which they have only the most tenuous possible connection.

Most circuits to consider who constitute the "members" of an assortment of entities called "trusts" have concluded that the "members" are the trustees, not the beneficiaries.[9] Those circuits have, it is true, re-

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any problems: that the present treatment of unincorporated entities is a construction of Section 1332 only, not of the Constitution. Such a plain statement would leave Congress free to amend the statute to specify the citizenship of entities like Maryland Trust REITs.

[9] *See Erlich v. Ouellette, Labonte, Roberge & Allen P.A.*, 637 F.3d 32, 34 n.2 (1st Cir. 2011) (ERISA pension fund); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397 n.6 (5th Cir. 2009) (unspecified "trusts"); *Johnson v. Columbia Props. Anchorage, L.P.*, 437 F.3d 894, 899 (9th Cir. 2006) (unspecified "trust"); *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002) (ERISA pension fund); *Homfeld II LLC v. Comair Holdings, Inc.*, 53 F. App'x 731, 732 (6th Cir. 2002) ("business trust"); *see also E.R. Squibb & Sons, Inc. v. Accident & Cas.*

lied principally on this Court's decision in *Navarro Savings Ass'n v. Lee* in reaching that conclusion. 446 U.S. 458, 462 (1980). And *Carden* did state that *Navarro* concerned only the distinct question of whether trustees may sue, and that "*Navarro* had nothing to do with the citizenship of the 'trust,' since it was a suit by the trustees in their own names." *Carden*, 494 U.S. at 193–94.

Nevertheless, *Navarro* discussed in detail the relationship of the beneficiaries to the trustees in Fidelity Mortgage Investors, a Massachusetts business trust. *Id.* at 459, 461–65. Even after *Carden*, that discussion is relevant to the question of whether beneficiaries constitute "members" of a trust.

The term "members" has no settled meaning as applied to a trust. Rather, as the Third Circuit has observed, "historically," the term "has not been applied in the context of a trust" at all. *Emerald Inv. Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 203 (3d Cir. 2007). In the absence of any settled legal meaning, the Court should look to business reality for guidance.

As *Navarro* explained, in a business trust the beneficial shareholders "can neither control the disposition of [the legal] action nor intervene in the affairs of the trust except in the most extraordinary situations." 446 U.S. at 464–65. The same is true of a Maryland Trust REIT. And so it would be wholly arbitrary to treat a Maryland Trust REIT as a citizen of a state merely because one of its shareholders

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Ins., 160 F.3d 925, 931 (2d Cir. 1998) (concluding that no trust was a party).

happens to have citizenship there. In *Letson* the Court could find no good reason why the citizenship of non-party shareholders, "not defendants in the suit," should destroy jurisdiction, particularly when those shareholders "cannot be sued" on a corporate liability. 43 U.S. (2 How.) at 554. Even if the Court will not follow *Letson*'s logic all the way to holding that Maryland Trust REITs, like corporations, are citizens in their own right for diversity purposes, it should at least hold that shareholders, who are "not defendants in the suit" and "cannot be sued" on a trust liability, are not "members" of the Maryland Trust REIT for diversity purposes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 14-1382

In The
[S]reme Court of the United States

AMERICOLD LOGISTICS, LLC, AND
AMERICOLD REALTY TRUST,

Petitioners,

v.

CONAGRA FOODS, INC., AND
SWIFT-ECKRICH, INC.,

Respondents.

ON WRIT OF CERTIORARI
[T]HE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

[B]IEF OF WINSTON WEN-YOUNG WONG AS [A]MICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus Dr. Winston Wen-Young Wong, OBE[2] ("Dr. Wong") is the eldest son of the late Yung-Ching Wang ("Y.C.") and is the sole legatee of the will of the late Yueh-Lan Wang ("Yueh-Lan"), to whom Y.C. was married for 72 years until his death.

Y.C. was the founder of Formosa Plastics Group, one of Taiwan's biggest and most profitable manufacturing conglomerates with annual sales of over $60 billion and operations in five countries, including the United States. Y.C. died on October 15, 2008 in New Jersey. In the year of his death, *Forbes* magazine ranked him the 178th wealthiest person in the world with a net worth of up to $6.8 billion, though it is estimated that his estate should have been valued in excess of $17 billion. Y.C. was celebrated as the true "son of Taiwan" in a state

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1 *Amicus* submits this brief pursuant to Supreme Court Rule 37.3. Counsel of record for all parties consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court together with this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no party or counsel for a party authored or paid for this brief in whole or in part, and no person other than *amicus* or his counsel made a monetary contribution to fund the preparation or submission of this brief.

2 Dr. Wong is a Taiwanese entrepreneur, scientist and philanthropist, and principal founder of the GRACE THW Group, where he has served as Chairman and Chief Executive Officer since 1996. Dr. Wong received a Ph.D. in Physics from Imperial College London and was recently named an Officer of the Most Excellent Order of the British Empire in recognition of his longstanding contributions to education and research and to UK and Taiwan education relations.

funeral attended by Taiwan's President Ying-jeou Ma and several thousand people.

A few months after Y.C.'s death, Dr. Wong learned that the vast majority of his father's wealth had been transferred to various trusts, both in offshore jurisdictions and in the United States, without Yueh-Lan's consent and in apparent violation of Taiwan civil law. One such trust, New Mighty U.S. Trust—a traditional trust declared for beneficiaries under the laws of the District of Columbia—holds approximately $2 billion in assets and cash.

Yueh-Lan, acting through her attorney-in-fact Dr. Wong, commenced suit in 2010 in the United States District Court for the District of Columbia to account for and recover the property that was transferred to New Mighty U.S. Trust without her consent. Because of the uncertainties surrounding the status and capacity of a "trust," as well as the divergence among the lower courts as to the issue presently before the Court, the action named New Mighty U.S. Trust, its sole trustee and one of its beneficiaries as defendants. The case, *Yueh-Lan Wang, by and through her attorney-in-fact, Winston Wen-Young Wong v. New Mighty U.S. Trust et al.*, No. 10-CV-1743, was dismissed by the district court on January 27, 2012 for lack of diversity jurisdiction based upon the "citizenship" of New Mighty U.S. Trust. 841 F. Supp. 2d 198 (D.D.C.). Yueh-Lan appealed to the United States Court of Appeals for the District of Columbia Circuit.

Yueh-Lan died on July 1, 2012, before briefing on her appeal had commenced. Yueh-Lan's will stated that even though Dr. Wong was not her biological child, he nevertheless treated her "as his natural birth mother" for which she was "deeply touched and grateful." (Appendix.) Yueh-Lan's will did not name an executor and, consequently, her appeal has been held in abeyance since late 2012 during the pendency of proceedings in Taiwan to appoint an executor. After three years of legal proceedings in Taiwan, three individuals were appointed joint executors of Yueh-Lan's will. On September 23, 2015, the executors moved to be substituted for Yueh-Lan in the appeal. That motion remains pending as of the filing of this brief.

Dr. Wong submits this *amicus* brief to draw the Court's attention to a critical distinction between a "traditional trust" and a "statutory trust," and, ultimately, to demonstrate that diversity of citizenship in a suit by or against a traditional trust is determined solely by the citizenship of its trustee.

INTRODUCTION AND SUMMARY OF ARGUMENT

The English legal historian, Frederic William Maitland, wrote, "[i]f we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely. the development from century to century of the trust

idea." *The Unincorporate Body*, *in* 3 THE COLLECTED PAPERS 272 (Herbert A.L. Fisher ed., 1911). The Court is called upon now to fit that ancient and celebrated device – the "trust" – within the framework of its diversity jurisdiction jurisprudence.

The diversity statute vests in the federal district courts original jurisdiction over all civil actions where the matter in controversy exceeds $75,000 and is between "citizens of different States" or "citizens of a State and citizens or subjects of a foreign state[.]" 28 U.S.C. § 1332(a)(1) & (2) (2015). The specific question presented by Petitioners is whether "the citizenship of a trust for purposes of federal diversity jurisdiction [is] based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both?" Pet'rs' Brief at i (Nov. 23, 2015).

Petitioners, including Americold Realty Trust ("Americcld"), have persuasively argued that, for diversity purposes, the "citizenship of a trust" should be determined solely by reference to the citizenship of its trustee. *See id. generally*. Should the Court, nevertheless, determine that diversity jurisdiction in the case at bar depends on the citizenship of the beneficiaries of Americold, the Court should expressly limit its holding to the specific type of trust at issue in this case, *i.e.*, a statutory business trust that is a legal entity under state law. The Court should distinguish between a statutory trust that is a legal entity under state law and a traditional trust, which is not, and hold that diversity of citizenship in a suit by or against a traditional trust is determined solely by reference to the citizenship of its trustee.

The majority of lower courts that have addressed the issue raised by Petitioners have held that, under the Court's decision in *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980), the "citizenship of a trust" is determined by the citizenship of its trustee. *See* Pet. for Writ of Cert. 19-21 (May 15, 2015) (collecting cases). The court below, however, and a minority of the courts that have encountered this issue, have held that under the Court's decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), the "citizenship of a trust" is determined by the citizenship "'of all the entity's members.'" *Conagra Foods v. Americold Logistics, LLC*, 776 F.3d 1175, 1176 (10th Cir. 2015) (quoting *Carden*, 494 U.S. at 195); *see also* Pet. for Writ of Cert. 27-33 (citing cases, including the district court decision from which Yueh-Lan appealed, *Yueh-Lan Wang ex rel. Wong v. New Mighty U.S. Trust*, 841 F Supp. 2d 198 (D.D.C. 2012)).

The fatal flaw in the decisions of those courts that have relied on *Carden* is the incorrect assumption that all trusts are "artificial entities" under state law. In fact, under the common law and the laws of the Several States, a "traditional" or "ordinary" trust—which is an express trust whose primary purpose is to hold and conserve property. *see* 13 AM. JUR. 2D *Business Trusts* § 6 (2015); *Morrissey v. Comm'r*, 296 U.S. 344, 357 (1935)—is not an artificial entity with a separate legal existence. 76 AM. JUR. 2D *Trusts* § 3 (2015). Rather, a traditional trust is merely a fiduciary relationship with respect to property. *Id.* It is not an artificial "person" in the eyes of the law; it cannot, and does

not, own anything; and it lacks capacity to sue or be sued. *See id.*

For purposes of diversity jurisdiction, then, a traditional trust is a non-existent, nominal party to which the *Carden* rule does not apply, and the Court must instead look to the real party to the controversy, which, as the Court held in *Navarro*, is the trustee when "he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." 446 U.S. at 464.

Accordingly, in a suit by or against a traditional trust, it is the trustee's citizenship that determines whether there is diversity of citizenship among the parties.

ARGUMENT

I. TRADITIONAL TRUSTS ARE DIFFERENT FROM STATUTORY TRUSTS IN KEY RESPECTS

The "trust" is "an 'institute' of great elasticity and generality: as elastic, as general as contract." FREDERIC W MAITLAND, EQUITY 23 (A. H. Chaytor & W J. Whittaker eds., 2d ed., revised 1936). "The purposes for which we can create trusts are as unlimited as our imagination. There are no technical rules restricting their creation. The trust can be and has been used to accomplish many different purposes." 1 AUSTIN W SCOTT, WILLIAM F

FRATCHER & MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS § 1.1 (5th ed. 2006).

A common trust purpose is to preserve wealth for the trust creator's family. *Id.* "The trust originated at the end of the Middle Ages as a means of transferring wealth within the family, and the trust remains our characteristic device for organizing intergenerational wealth transmission when the transferor has substantial assets or complex family affairs." John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 165 (1997). Trusts also have long been used to provide support to charitable purposes and organizations, *see* GEORGE W. KEETON, THE MODERN LAW OF CHARITIES 1-2 (1962) (tracing the origin of perpetual charitable trusts to the ecclesiastical courts of the medieval period); *Attorney Gen. v. Webster*, 20 Eq. 483, 489-90 (1875) (M.R.) (concerning a charitable trust declared in 1585); *In re Stoddard* (App. 1622), Toth. 31, *reprinted in* GEORGE DUKE, THE LAW OF CHARITABLE USES 81 (1676), and to provide support to associations whose purposes are "of a social, rather than a charitable, character." 1 SCOTT ET AL., *supra* p.7, § 1.1. These types of express trusts[3] are typically characterized as "traditional" or "ordinary"

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[3] An "express trust" is one which arises out of a manifestation of an intention to create it. William F. Fratcher, *Property & Trust*, *in* 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 11-23 (Frederick H. Lawson ed. 1973). It can be distinguished from a resulting trust, which arises from conduct that is "deemed by the rules of equity to be equivalent to a manifestation of an intention to create it[,]" and a constructive trust, which is a trust imposed by a court, usually against the intention of the property holder. *Id.*

trusts, because their primary purpose is "to hold and conserve particular property." 13 AM. JUR. 2D *Business Trusts* § 6; *Morrissey*, 296 U.S. at 357; *see* RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. a (2003).

Since at least the 1800s, trusts also have been used as vehicles for conducting business. *See* Robert H. Sitkoff, *Uncorporation: A New Age?: Trust as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 32 (2005). In 1929, it was observed that "modern business has become honey-combed with trusteeship. Next to contract, the universal tool, and incorporation, the standard instrument of organization, it takes its place wherever the relations to be established are too delicate or too novel for these coarser devices." Nathan Isaacs, *Trusteeship in Modern Business*, 42 HARV. L. REV. 1048, 1060-61 (1929). Depending on the applicable State's law, a business trust can be governed by common law, or predominantly by statute, as are real estate investment trusts (REITs) such as Americold. *See* Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055 (2010).

To understand the trust's place within the framework of the Court's diversity jurisdiction jurisprudence, it is necessary to examine the history and essential attributes of the different types of "trusts."

A. Born in Equity, a Traditional Trust is a Fiduciary Relationship with Respect to Property, Not an Artificial Entity Under State Law

"The trust owes its peculiar character to the more or less accidental circumstance that in England in the fifteenth century, and for four hundred years thereafter, there were separate courts of law and equity. But for this, the trust, at least as we know it, would never have developed." 1 SCOTT *ET AL.*, *supra* p.7, § 1.1; *see also* Isaacs, *supra* p.8, at 1049 ("What distinguishes the Anglo-American trust is the peculiar framework of law and equity as separate systems in the administration of justice that has enabled the English law to conceive of the trustee as having a legal title and the beneficiary as having a standing only in a court of equity.")

After the Norman Conquest of 1066, England became dominated by a feudal system whereby the King held absolute dominion over the land in the Kingdom, and his subjects could hold land only as tenants of the King or under-tenants, upon condition that they perform feudal services to their overlord. *See* Fratcher, *supra* n.3, § 11-8. As late as the sixteenth century, "[l]long after the feudal system lapsed, burdensome feudal landholding rules endured," John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 633 (1995), typified by restrictive inheritance laws including the law of primogeniture and mandates that the decedent's property must pass by escheat, *i.e.*, revert back, to the overlord if there was no living relative eligible to succeed as an heir, Fratcher,

supra n.3, § 11-8. Moreover, until the Statute of Wills was enacted in 1540, "[r]ural land could not be devised by will, so the tenant was unable either to avoid escheat by this means or to make provision for his wife, his parents or his daughters and younger sons." *Id.*

From under the weight of these burdensome feudal laws arose the concept of the "use," which landholders employed "to protect themselves and their families against the gross injustices of a system of land law which was centuries out of date[.]" *Id.* § 11-9. Uses could be passive—where the "foeffer" conveyed property to the "foeffee," who merely held legal title to the property for the "use" of the *cestui que use*; or they could be active, which required the foeffee to manage the property for the benefit of the *cestui que use*. *See* 1 AMY M. HESS, GEORGE G. BOGERT & GEORGE T. BOGERT, *The Law of Trusts and Trustees* § 2 (3d ed. 2007). An active use was called an active or special trust. *Id.*[4]

Uses and trusts originally were "merely honorary obligations, dependent upon the good faith of the foefee." 1 SCOTT ET AL., *supra* p.7, § 1.4. As the common law courts became increasingly rigid, though, refusing to enforce promises grounded solely

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[4] The Court has in the past referred to uses and trusts as being synonymous, *see Davis v. United States*, 495 U.S. 472, 484 (1990), but most legal historians agree that they were different devices and, although active trusts were relatively rare in medieval England, they "had existed from the inception of the use device," Fratcher, *supra* n.3, § 11-16. 1 HESS ET AL., *supra* p.10, § 2. Maitland suggested that active trusts arose for the purpose of managing land while the beneficiary was away on crusade. *See* Fratcher, *supra* n.3, § 11-16.

in honor, beneficiaries of uses and trusts began to petition the king for redress against "faithless foeffees." *See id.*, *supra* p.7, § 1.5; 1 HESS ET *AL.*, *supra* p.10, § 3. The King began to refer these petitions to the Chancellor, who was a member of the King's counsel, and by the end of the fourteenth century, the Chancellor had become "the custodian of the king's conscience, and his court became the court of conscience where equity and fairness, rather than technicality, were supposed to rule." 1 HESS ET *AL.*, *supra* p.10, § 3.

Eventually, uses "incurred the enmity of the crown," perhaps because of their predilection to be used as a vehicle for committing fraud, *id.* § 4, but more likely because they tended to decrease the landholdings of the nobility and the Crown. *See* 1 SCOTT ET AL, *supra* p.7, § 1.6. In 1535, Parliament, at the insistence of Henry VIII, passed the Statute of Uses, which effectively abolished uses by investing the legal estate in the *cestui que use*. *See id.* Most types of passive uses disappeared, but the English law courts, which had grown accepting of uses and trusts, interpreted the Statute narrowly to leave active trusts and certain types of passive uses outside of its reach. *See* Fratcher, *supra* n.3, § 11 16. These equitable interests that survived the Statute of Uses, which for centuries thereafter continued to be governed by the Chancellor's court of equity, became known as a "trust," and formed "the basis of modern trust law." 1 HESS ET AL., *supra* p.10, § 5.

Feudal property restrictions gradually disappeared from England, but the trust remained—because it "ceased to be a conveyancing device for

holding freehold land and has become instead a management device for holding financial assets." Langbein, *Contractarian Basis*, *supra* p. 9, at 637 This change arose as a response to the "radical" shift "away from family real estate as the dominant form of wealth." *Id.* "'Wealth, in a commercial age, is made up largely of promises.'" *Id.* (quoting ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922)). Thus the modern traditional trust was born.

While the history of the trust is well understood, a generally accepted definition of a traditional trust had eluded consensus for much of its history. Indeed, it has been stated that:

> [n]o definition of a trust appears to have been accepted as both comprehensive and exact. Strictly, the words refer to the duty or aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence, the administration will be in such a manner that the consequential benefits and

> advantages accrue, not to the trustee, but to the persons called *cestuis que trust*, or beneficiaries, if there be any, if not, for some purpose which the law will recognise and enforce.

LYNTON TUCKER, NICHOLAS LE POIDEVIN, & JAMES BRIGHTWELL, LEWIN ON TRUSTS 1-002 (19th ed. 2014) (quoting *Re Scott* [1948] S.A.S.R. 193, 196). *Cf.* H. ARTHUR SMITH, A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY 22 (1882) ("A trust is a duty deemed in equity to rest on the conscience of a legal owner."); Walter G. Hart, *What is a Trust?*, 15 L. Q. REV. 294, 301 (1899) ("A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation."); Bernard Rudden, *John P. Dawson's Gifts and Promises*, 44 MOD. L. REV. 610, 610 (1981) (book review) ("[T]he normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime.").

Despite the absence of complete historical consensus, it is now generally accepted that a traditional trust may be defined as:

> a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for

> one or more persons, at least one of whom is not the sole trustee.

RESTATEMENT (THIRD) OF TRUSTS § 2. Most significant for present purposes, however, is to recognize what a traditional trust is not:

> A trust is not a legal entity. A trust is not an entity distinct from its trustees and capable of legal action on its own behalf, but merely a fiduciary relationship with respect to property. A trust is not a legal 'person' which can own property or enter into contracts, rather, a trust is a relationship having certain characteristics.

76 AM. JUR. 2D *Trusts* § 3; 14 HESS ET AL., *supra* p.10, § 712 ("A trust is not a legal person."); *cf. Taylor v. Davis' Adm'x*, 110 U.S. 330, 334 (1884) ("The trust estate cannot promise[.]")

Numerous cases confirm that a trust is not an entity or a "person" in the eyes of the law and, therefore, lacks capacity to sue or be sued.[5] *See NFS Servs., Inc. v. Dorchester Trust*, 78 Civ. 4758, 1979 U.S. Dist. LEXIS 11052, at *4 (S.D.N.Y. July 13, 1979) ("A trust is not a legal entity and it does not

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[5] The terms "artificial entity," "artificial person," "legal entity," "legal person" and "juridical person" are synonymous in law. *See Marshall v. Balt. & Ohio R.R. Co.*, 47 U.S. (16 How.) 314, 327 (1854) (using the terms "artificial person," "legal entity" and "artificial entity" interchangeably when describing a corporation); BLACK'S LAW DICTIONARY 1258 (9th ed. 2009). (An "artificial person" is also known as a "juridical person" or a "legal person.").

have the capacity to be sued as a party defendant."); *Limouze v. M.M. & P. Maritime Advancement, Training, Educ. & Safety Program*, 397 F. Supp. 784, 789 (D. Md. 1975) (holding that "the weight of authority is clear that the trust estate is not a person in the eyes of the law and does not have the capacity to be sued as an entity"); *Plasteel Prods. Corp. v. Eisenberg*, 170 F. Supp. 100, 101 (D. Mass. 1959) (same), *aff'd*, 271 F.2d 354 (1st Cir. 1959); *N. Sec. Ins. Co. v. Doherty*, 987 A.2d 253, 256 (Vt. 2009) ("at common law, trusts are not independent legal entities with the capacity to sue or be sued"); *Jacobs v. Weinstein*, 370 S.E.2d 860, 865 (N.C. Ct. App. 1988) ("Neither a trust estate nor trust property are recognized as separate legal entities"), *review denied*, *Matter of Jacobs*, 373 S.E.2d 863 (N.C. 1988); *Larson v. Sylvester*, 185 N.E. 44, 45 (Mass. 1933) ("[A] trust is not a legal personality" and, with very limited exceptions, "cannot be sued."). Nor does state statutory law say otherwise. Although many States have adopted statutes that govern the affairs of traditional trusts,[6] "[n]o state has gone so far as to provide by statute that trusts should enjoy entity status." Erin C.V Bailey, *Asset Protection Trusts Protect the Assets*, 21 PROBATE & PROP. 58, 59 (2007). It is, thus, clear that under the common law and the laws of the Several States, a traditional trust is not

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[6] *See* Carol Warnick, *Uniform Trust Code A Time for Colorado*, THE NAT'L L. REV. (Sept. 1, 2015), http://www.natlawreview.com/article/uniform-trust-code-time-colorado (noting that the Uniform Trust Code has been adopted in 31 states (including the District of Columbia) as of September 1, 2015).

an entity or a person in the eyes of the law, and is not subject to suit.[7]

B. Most Modern Statutory Trusts, Including Americold, Are Separate Legal Entities Under State Law

There has been a trend over the last quarter century for States to enact legislation authorizing the creation of new types of "statutory trusts." *See* Sitkoff, *supra* p.8, at 35-36, n.22. This began in 1988 when Delaware passed the Delaware Business Trust Act, which was renamed the Delaware Statutory Trust Act in 2002. *See* Del. Code Ann. tit 12, §§ 3801-3863 (2015). Statutory trusts grew out of the business trust, also known as a "common law trust" or a "Massachusetts trust" because of its prevalence and origination in that State. *See* Sitkoff, *supra* p.8, at 32-33.[8]

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[7] Although a traditional trust lacks capacity to sue or be sued under state law, it nevertheless may be caught in the crosshairs of a dispute invoking diversity jurisdiction, either because no party raises an objection to the trust's capacity and the objection is thereby waived, *see First Union Nat'l Bank v. Pictet Overseas Trust Corp., Ltd.*, 351 F.3d 810, 815 (8th Cir. 2003), or because a traditional trust is considered to be a "member" of an artificial entity, such as a limited liability company, that is a party to a suit, *see Thales Alenia Space Fr. v. Thermo Funding Co., LLC*, 989 F. Supp. 2d 287, 290-91 (S.D.N.Y. 2013).

[8] The Massachusetts business trust evolved from the traditional trust. Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDOZO L. REV. 325, 325 (2001). The primary purpose of a business trust, however, is not to conserve property, but rather to make a profit and to serve as "a vehicle for the conduct of commercial

In 2009, in an effort to create a uniform set of rules governing statutory trusts, the National Conference of the Commissioners on Uniform State Laws approved the Uniform Statutory Trust Entity Act ("USTA"). The USTA has been adopted by Kentucky and the District of Columbia. *See* Ky. Rev. Stat. Ann. § 386A.1-010 *et seq.* (LexisNexis 2015); D.C. Code § 29-1201.01 *et seq.* (2015).[9] The USTA, like the Delaware Statutory Trust Act and most other modern statutory trust codes, classify a statutory trust as a separate legal entity. *See* USTA § 302; Del. Code Ann. tit. 12, § 3810(a)(2). As such, the statutory trust is endowed with certain characteristics, including the capacity to sue and be sued, to own and convey property, and to transact in its own name. USTA § 302, cmt. Petitioner Americold, which was formed under the Maryland REIT Law, is a distinct legal entity. Md. Code Ann., Corps. & Ass'ns § 8-102 (LexisNexis 2015).

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enterprise." Herbert B. Chermside, Jr., *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704 § 2 (2009). Some states view the common law trust as a legal entity, but many, including Massachusetts, do not. *See id.* § 4 (collecting cases and statutes); *Peterson v. Hopson*, 29 N.E.2d 140, 149 (1940) (noting that a Massachusetts business trust may be sued under Mass. Gen. Laws ch. 182, § 6, but nevertheless is not a separate legal entity).

[9] *See* UNIFORM LAW COMM'N, *Acts: Statutory Trust Entity Act*, http://www.uniformlaws.org/Act.aspx?title=Statutory%20Trust%20Entity%20Act (last visited Nov. 29, 2015).

II. THE COURT SHOULD HOLD THAT DIVERSITY JURISDICTION IN A SUIT BY OR AGAINST A TRADITIONAL TRUST IS DETERMINED BY THE CITIZENSHIP OF ITS TRUSTEE

Under the Court's precedents, diversity of citizenship in a suit by or against a traditional trust should be determined by the citizenship of its trustee alone; the domicile or "'residence of those who may have the equitable interest' is simply irrelevant." *Navarro*, 446 U.S. at 463 (quoting *Bonnafee v. Williams*, 44 U.S. (3 How.) 574, 577 (1845)).

While *amicus* concurs with Petitioners' conclusion as to the "citizenship" of all trusts, including traditional trusts, Petitioners' formulation of the Question Presented requires some refinement because it presumes, at least facially, that a trust is a "citizen" of a State, and then asks the Court to determine how the trust's "citizenship" is determined. *Cf. Carden*, 494 U.S. at 187 n.1 ("The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It 'do[es] not consider' 'whether the limited partnership is a "citizen,"' but simply 'assum[es] it is a citizen[.]'") (citation omitted). Notwithstanding the wording of the Question Presented, Pet'rs' Brief at i, no party to this appeal in fact contends that a "trust" should be afforded citizenship in its own right for purposes of diversity jurisdiction. *See* Pet'rs' Brief 8-9. Properly framed, though, the question before the Court is, in fact, two fold: first, whether a "trust" is a "citizen" of a State in its own right for purposes of diversity

jurisdiction; and second, if a "trust" is not a "citizen," then *whose* "citizenship" – the trustees, the beneficiaries or both – determines whether there is diversity of citizenship among the parties in a suit by or against a trust. *See Carden*, 494 U.S. at 188 n.1.[10]

A. A Trust Is Not a "Citizen" of a State in Its Own Right

A trust is not a "citizen" of a State in its own right for purposes of diversity jurisdiction. Because traditional trusts and most common law business trusts are not distinct legal entities under state law, they cannot in any logical sense be deemed a "citizen" of a State under the diversity statute. *Cf. Moor v. County of Alameda*, 411 U.S. 693, 719 (1973) (rejecting the State of California's argument that a county of the State is not a "citizen" for purposes of diversity jurisdiction because, under California law, a county has "'corporate powers'," "is designated a 'body corporate and politic,'" has capacity to sue and be sued, may hold and convey property, may enter into contracts and, "significantly for purposes of suit, it is deemed to be a 'local public entity'"); *Barham v. Toney*, No. CIV-14-388, 2015 U.S. Dist. LEXIS 107331, at *7 (E.D. Okla. Aug. 17, 2015) (stating that an Oklahoma limited liability company which

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[10] The Court foreshadowed the first of these questions in *Carden*, 494 U.S. 185. In the course of discussing its decision in *Navarro*, the *Carden* Court explained that in *Navarro*, "we did indeed discuss the characteristics of a Massachusetts business trust -- not at all, however, for the purpose of determining *whether the trust had attributes making it a 'citizen*[.] '" *Carden*, 494 U.S. at 191 (emphasis added).

"cease[d] to exist as a legal entity" when its articles of organization were cancelled "has no citizenship for diversity purposes"); *compare id. with Go Fast Sports & Bev. Co. v. Buckner*, No. 08-cv-01527, 2008 U.S. Dist. LEXIS 65754, at *4-5 (D. Colo. July 23, 2008) (holding that "[a]dministrative dissolution of a perpetual LLC d[id] not destroy its citizenship for diversity purposes" because "the LLC continue[d] to exist under [Colorado] state law after administrative dissolution" in order to wind up its affairs). Indeed, a traditional trust—and a common law business trust to the extent that it is not deemed an entity by applicable state law—is no more a "citizen" of a State than is a contract. *Cf.* Langbein, *Contractarian Basis*, *supra* p.9, at 627 ("Trusts are contracts.").[11]

B. The *Carden* Rule to Determine Citizenship Applies Only to Artificial Entities That Are Creatures of and Exist Under State Law, Not to Traditional Trusts

Given that a trust is not a "citizen" of a State, the question that remains is whose citizenship must be consulted in determining whether diversity jurisdiction exists when a "trust" is a party to a suit? Although few courts have distinguished between traditional trusts and statutory or business trusts

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[11] *Amicus* concurs with the parties' conclusion that a REIT, such as Americold, and any other statutory or business trust that is a legal entity under state law, also does not possess "citizenship" in its own right, but defers to their discussion of the issue.

for purposes of diversity jurisdiction,[12] it is critical to account for their differences in analyzing the citizenship question.

In attempting to determine the "citizenship of a trust," the lower courts have split over the proper reconciliation of the Court's decisions in *Navarro*, 446 U.S. 458, and *Carden*, 494 U.S. 185. In *Navarro*, the Court held that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." 446 U.S. at 464. In *Carden*, the Court held that diversity jurisdiction in a lawsuit by or against an artificial entity (other than a corporation) depends on the citizenship "of all the entity's members." 494 U.S. at 195.

The majority of lower courts that have addressed this issue have relied on *Navarro* in holding that the "citizenship of a trust" is determined by the citizenship of its trustee(s). Pet. for Writ of Cert. 19-21 (collecting cases). A minority of courts, though, including the court below, have looked to *Carden* and held that "[t]he citizenship of a trust, just like the citizenship of all other artificial

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[12] This distinction was recognized by the district court in *Thales*, 989 F Supp. 2d 287. Many of the courts that took the minority position, however, have relied on the United States Court of Appeals for the Third Circuit' decision in *Emerald Investors Trust v. Gaunt Parsippany Partners*, which stated that "[o]ur research has not led us to conclude that the type of trust calls for a difference in treatment when determining a trust's citizenship for diversity of citizenship jurisdictional purposes." 492 F.3d 192, 198 n.10 (3d Cir. 2007). For the reasons discussed herein, this conclusion was simply wrong.

entities except corporations, is determined by examining the citizenship 'of all the entity's members[,]'" *Conagra Foods*, 776 F.3d at 1176 (quoting *Carden*, 494 U.S. at 195); *see* Pet. for Writ of Cert. 27-33 (collecting cases). Those courts, including the Tenth Circuit which relied heavily on the Third Circuit's decision in *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d at 200-02, concluded that the "members" of a trust included, at a minimum, all of the trust's beneficiaries. *See Conagra*, 776 F.3d at 1181-82.

The fundamental flaw in the minority courts' diversity analysis is that they assumed, incorrectly, that all trusts are "artificial entities" under state law. *See Emerald Investors Trust*, 492 F.3d at 202, 203 (concluding, without analysis, that an "artificial entity" is "a term that we will treat as including a trust"). But *Carden* is inapplicable to traditional trusts since, as discussed above, *see supra* Section I.A, a traditional trust is not an "artificial entity" under state law.

The plaintiff in *Carden*, a limited partnership organized under the laws of Arizona, brought suit in federal district court on the basis of diversity jurisdiction. 494 U.S. at 186. The limited partnership argued that, like a corporation, it was a "citizen" of its state of formation for purposes of diversity jurisdiction or, alternatively, that its "citizenship" should be determined only by reference to the citizenship of its general partners. *See* Brief of Resp't at 33, *Carden*, 494 U.S. 185 (No. 88-1476). Although the Court denied the limited partnership the status of a "citizen" of a State in its own right for

purposes of diversity jurisdiction, *see Carden*, 494 U.S. at 190, the limited partnership's existence as a separate legal entity under Arizona law was critical to the Court's analysis. The Court explained that:

> [w]e have often had to consider the status of *artificial entities created by state law* insofar as that bears upon the existence of diversity jurisdiction. The precise question posed under the terms of the diversity statute is whether such an entity may be considered a "citizen" of the *State under whose laws it was created.*

Id. at 187 (emphasis added). The question in *Carden*, therefore, was how to determine the citizenship of an *entity that was created under state law*. *Carden* does not speak to the very different question of determining the citizenship of a fiduciary relationship – such as a traditional trust – that is *not* an entity under state law. The plain language of the *Carden* opinion confirms this.

First, the Court framed the scope of the issue by looking at the historical treatment of a corporation formed under state law: "[a] corporation is the paradigmatic *artificial 'person,'* and the Court has considered its proper characterization under the diversity statute on more than one occasion. " *Id.* at 187-88 (emphasis added). Thus, *Carden* was but one in a long line of cases addressing the citizenship of different types of "artificial 'person[s]'," *id.*, and its task was to determine the citizenship of yet another kind of artificial person, *i.e.*, a formal entity created

by state law and endowed by that law with certain legal rights, privileges and duties, *see Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667-68 (1819) (Story, J., concurring); BLACK'S LAW DICTIONARY 1258.

Second, the Court defined the scope of its holding through its reliance on earlier cases addressing the citizenship of new "artificial 'persons'" or "entities" other than corporations. *Carden*, 494 U.S. at 188-189. The Court explained that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have just as firmly resisted extending that treatment to other entities." *Id.* at 189. It then described a trilogy of cases where it refused to apply the corporation rule for citizenship to other legal entities created under state law, and instead held that diversity of citizenship by or against those entities must be determined by the citizenship of their members. *See id.*

In *Chapman v. Barney*, the Court held that even though a joint stock company was organized under a law of the State of New York and was a citizen of that State, it "cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation." 129 U.S. 677, 682 (1889). Similarly, in *Great Southern Fire Proof Hotel Company v. Jones*, the Court held that although a "limited partnership association" may be described as a "'new artificial person'" possessing "some of the characteristics of a corporation" and was deemed a "citizen" by the Pennsylvania law under which it was created, it could not be regarded

"as a corporation within the jurisdictional rule" for diversity. 177 U.S. 449, 456, 457 (1900). The Court stated emphatically that "[t]hat rule must not be extended." *Id.* at 457. And, in *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965), a case involving the citizenship of a national labor union whose existence as a juridical person had been recognized under state (and federal) law, *see United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385-388 (1922), the Court again "reiterated that 'the doctrinal wall of Chapman v. Barney[]' . . would not be breached." *Carden*, 494 U.S. at 189 (quoting *R.H. Bouligny*, 382 U.S. at 151). In each of these cases, the Court refused to treat the artificial persons at issue like corporations, and instead held that the citizenship of their members controlled the diversity analysis.

Summarizing the central holding of the trilogy, the *Carden* Court emphasized that "*common-law entities*," *i.e.*, entities that found their origins in the common law, "would be treated *for purposes of the diversity statute* pursuant to the 'tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnerships.'" *Carden*, 494 U.S. at 190 (emphasis added) (quoting *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480 (1933)). And at common law, before the enactment of various state statutes creating new artificial legal entities such as the limited partnership, only corporations had formal charters establishing their existence as separate entities under law, whereas partnerships were "mere collections of individuals," *Navarro*, 446 U.S. at 461, *see Riddle v. Whitehill*, 135 U.S. 621, 633-34 (1890)

("A partnership, as such, could not hold the legal title to real estate, as it is not a person in fact or in law"; rather, "'[i]f the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship.'") (internal citation omitted); *see also Fidelity Trust Co. v. BVD Assocs.*, 492 A.2d 180, 182-83 (Conn. 1985) (explaining that at common law a partnership was not a legal entity but rather "an aggregate of individuals[,]" and the partners were tenants in common of firm property).

Thus, it was by analogy to this common law tradition that the Court erected the "the doctrinal wall of Chapman v. Barney," *R.H. Bouligny*, 382 U.S. at 151. The "doctrinal wall" was created, *solely for purposes of the diversity statute*, to determine the citizenship of formal legal entities that did not exist as separate legal or artificial "persons" at common law. Indeed, there was no need for the Court to even consider this issue until these new "artificial persons" were created by statute. Before this each of the individual members of the partnership would have been required to join or be joined in the suit. *See United Mine Workers*, 259 U.S. at 385.

Third, the *Carden* Court confirmed that its holding addressed only formal entities created under state law when it rejected the dissent's effort to extrapolate from *Navarro* a "'real party to the controversy approach'" which would have required that the citizenship of the limited partnership be determined solely by the citizenship of the partners who had "'control over the conduct of the business and the ability to initiate or control the course of

litigation[.]'" *Carden*, 494 U.S. at 193 (quoting *id.* at 201, 204 (O'Connor, J., dissenting)). The Court stated that "[t]here are *not*, as the dissent assumes, multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership." *Id.* at 188 n.1. *Navarro*, the Court wrote, "is irrelevant, since it involved *not a juridical person* but the distinctive common-law institution of trustees." *Id.* at 194 (emphasis added). Thus, *Carden*'s holding applies only to artificial entities, juridical persons, artificial persons, formal legal entities created and existing under state law. *See id.* at 195.

The United States Court of Appeals for the Second Circuit has, appropriately, recognized the limits of *Carden*'s reach, explaining that "*Carden*'s express language applies only to 'artificial entities created by state law[,]'" and observing that it was "not by chance" that the Court "emphasized the importance of the existence of such an artificial entity [under state law] in its holding that every limited partner must have diverse citizenship." *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 937 (2d Cir. 1998) (quoting *Carden*, 494 U.S. at 187). Indeed, it was not by chance, but rather a matter of constitutional proscription; that is, the federal courts are powerless to create—and thereby accord certain rights and privileges to—artificial entities, that, under our system of federalism, can owe their existence only to the laws of the States, for "such power as federal courts possess to interpret and apply state law is, at best, a negative power or, perhaps more properly, a badge of weakness, arising as it does from the fact that such

courts lack constitutional authority to create a broad body of common law." *In re General Motors Corp. Dex-Cool Prods. Liability Litig.*, 241 F.R.D. 305, 321 (S.D. Ill. 2007) (citing "the rarely-noted constitutional basis for the *Erie* doctrine").

As the Court stated long ago in *Erie Railroad Co. v. Tompkins*, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U.S. 64, 78 (1938). The reason, the Court explained, is that:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. *Erie* "recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers[.]" *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring). Simply put, a federal court sitting in diversity "cannot give that which [the State] has withheld." *Angel v. Bullington*, 330 U.S. 183, 192 (1947).

Had the Court extended its holding in *Carden* to include relationships or associations that have no separate existence as artificial entities under state law, it would have implicitly authorized the federal courts to recognize the legal existence of an artificial entity without regard to, or even despite, the governing State's decision not to accord entity status to such relationships or associations.[13] Such an exercise of power by the federal courts would offend not only Rule 17(b) of the Federal Rules of Civil Procedure and the Rules Enabling Act, but more significantly, the Constitution and the system of federalism on which our Government was founded. *See Law v. NCAA*, 167 F.R.D. 464, 475, 475 n.18 (D. Kan. 1996) (stating that "even though the NCAA is properly subject to suit in its own name under Rule 17(b), it otherwise has no status or legal existence which is distinct from the members which compose it[,]" and explaining that "[g]enerally, state law determines whether unincorporated associations have legal existence" and "[a]ny discrepancy between

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[13] Of course, under *Erie*, federal courts sitting in diversity must "apply state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465. "While the authority on the point is slim -- perhaps because the answer to the question is obvious -- " legal existence is a question of substantive law. *Roby v. The Corporation of Lloyd's*, 796 F. Supp. 103, 111 (S.D.N.Y. 1992) (explaining that "[c]apacity to be sued and legal existence are separate and distinct concepts," and while both "are prerequisites to the suability of an entity," capacity is a procedural matter governed by Fed. R. Civ. P. 17(b) whereas "[l]egal existence is a substantive proposition that cannot be controlled by a rule of procedure"); *see Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 77 (1944) (Frankfurter, J., concurring) (distinguishing between "suability" and legal "status," recognizing that the former is a "procedural matter" while the latter is a "substantive issue").

state law and federal practice raises potential problems with respect to *Erie*"); *Nat'l Bank of Washington v. Mallery*, 669 F. Supp. 22, 26 (D.D.C. 1987) (reasoning that "[i]f the Court were to treat a suit against the partnership class as if it were a suit against" a single artificial entity, "despite the District of Columbia's decision to deny the partnership the status of a jural person," it "would effectively negate the District's decision not to extend entity treatment to the partnership. Both Rule 17(b) and the commands of the *Erie* doctrine forbid this denigration of the laws of the sovereign states[.]").[14] *Carden* did not sanction such a course.

Thus, under the express language of *Carden*, as informed by the *Erie* doctrine, the "all the members" rule for artificial entities does not apply in

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[14] Although *Coronado Coal*, 259 U.S. at 390, clarified long ago that capacity to sue is a procedural rather than a substantive matter, it has been argued that Rule 17(b), which governs capacity to sue or be sued in federal court, implicitly recognizes the limits *Erie* placed on the federal courts by deferring to state law to determine capacity except in suits to enforce substantive rights existing under the Constitution or federal law—perhaps for the simple reason that capacity to sue is so often inextricably intertwined with legal existence. *See NCAA*, 167 F.R.D. at 474 n.16 ("Rule 17(b) provides that in diversity cases, state law determines the association's capacity to sue or be sued. A contrary rule would arguably offend the principle of *Erie*[.]"). It may be more properly argued that Rule 17(b) recognizes the limits placed upon the Court by the Rules Enabling Act, 28 U.S.C. § 2072(b), and the constitutional principles underpinning it, *see Hanna*, 380 U.S. at 465-66, 470-71, though this may be a distinction without a difference in this context, because the *Erie* doctrine is informed by both the Rules of Decision Act, 28 U.S.C. § 1652, *and* the Rules Enabling Act, *see Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 438-39 (2010) (Ginsburg, J., dissenting).

diversity cases by or against a traditional trust or common law business trust that is not a legal entity under state law.

C. *Navarro* Controls the Diversity Analysis for a Traditional Trust

Under *Navarro*, 446 U.S. 458, the trustee of a common law trust who has customary powers to hold, manage and dispose of the trust assets is the real party to the controversy and a traditional trust is a nominal party whose "citizenship" must be disregarded for purposes of determining diversity jurisdiction. "Early in its history, this Court established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." *Id.* at 460. It is axiomatic that "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Id.* at 461.

By any measure, a traditional trust, which is not a legal entity under state law and does not and cannot own anything, is a nominal party to an action. *Cf. Barham*, 2015 U.S. Dist. LEXIS 107831, at *7 ("[A] non-existent entity is effectively a nominal party that was not required to join in the removal of this action.") Thus, a traditional trust's "citizenship" must be disregarded in favor of the real party to the controversy. *See Navarro*, 446 U.S. at 461.

Navarro makes clear that a trustee who holds customary powers over the trust assets is the real

party to the controversy in a suit involving the trust property. *Id.* at 464. The trustee of a traditional trust holds legal title to the trust corpus and, in almost all circumstances, possesses such customary powers. *See, e.g., Wahl v. Schmidt*, 138 N.E. 604, 606 (Ill. 1923). Even if a traditional trust is named a party to the suit, it is the trustee who is the real party to the controversy, and the trustee's citizenship alone determines whether there is diversity of citizenship. Indeed, "[t]he Court never has analogized express trusts to business entities for purposes of diversity jurisdiction." 446 U.S. at 463 n.10. Rather, when someone speaks of a traditional "trust" as a party to a suit, what he really means is "the distinctive common-law institution of trustees," *Carden*, 494 U.S. at 194; *see Plasteel Prods.*, 170 F. Supp. at 101 ("[O]f course, a trust estate is not a legal entity and cannot become a party to anything. Doubtless what the parties mean is that they feel the Agreement purported to make the trustees partners in their representative capacities only[.]").

D. Practical Considerations Dictate That Diversity of Citizenship in a Suit by or Against a Traditional Trust Must Be Determined by the Citizenship of the Trustee

Practical considerations also mandate that diversity of citizenship by or against a traditional trust must be determined solely by reference to the citizenship of its trustee. Chief among them is that the beneficiaries of a traditional trust often are not actual persons or entities whose citizenship can be determined under any traditional test for diversity

jurisdiction. For instance, a trust may be declared for the benefit of charitable purposes. *See, e.g.*, D.C. Code § 19-1304.05 (2015). While a "purpose" plainly does not possess any "citizenship," the question arises, which past, present or theoretical future recipients of distributions from the trust should be deemed present beneficiaries for purposes of the diversity statute? If a charitable organization received a one-time distribution in 2006, and never since, is that charity a beneficiary for purposes of the diversity analysis? What if the decision was made by the trustee that the charity would never again receive a distribution? What if the decision as to whether to provide another distribution to that charity is contingent upon the occurrence of some future event? *Cf. Thales*, 989 F. Supp. 2d at 290-91 n.1 (referencing a Colorado statute that defines a beneficiary of a trust to include "'a person who has any present or future interest, vested or contingent'") (quoting Colo. Rev. Stat. § 15-10-201(5) (2013)). Moreover, the declaration of trust of a traditional trust may provide for an open class of beneficiaries, whose ranks not only may change from moment to moment, but also may be uncertain at any given moment in time.

The practical difficulties of determining the citizenship of beneficiaries of a traditional trust, which may include such abstract recipients as charitable purposes or an heir who has not yet been, and may never be, born, raise prudential concerns which demand that diversity jurisdiction in a suit by or against a traditional trust be determined solely by reference to the citizenship of its trustee. The Court has said that "'[j]urisdiction should be as self-

regulated as breathing; litigation over whether the case is in the right court is essentially a waste of time and resources.'" *Navarro*, 446 U.S. at 464-65 n.13 (quoting David P Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1 (1968)). To attempt to determine which beneficiaries—real or abstract, past or future, actual or potential—should be included as "members" of a trust for purposes of diversity jurisdiction, and how *their* citizenship should be determined, are "questions whose complexity are particularly unwelcome at the threshold stage of determining whether a court has jurisdiction[,]" *Carden*, 494 U.S. at 197.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that in a diversity suit by or against a trust, diversity of citizenship should be determined by the citizenship of the trustee. Should the Court reach a different conclusion in this case, though, it should issue a narrow holding that sets forth a rule for diversity jurisdiction only with respect to the specific type of trust at issue in this case, a statutory business trust that is a distinct legal entity under the laws of the State by which it was created, and the Court should hold that in a diversity suit by or against a traditional trust, diversity of citizenship is determined by the citizenship of its trustee.

Respectfully submitted,

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November 30, 2015

APPENDIX TABLE OF CONTENTS

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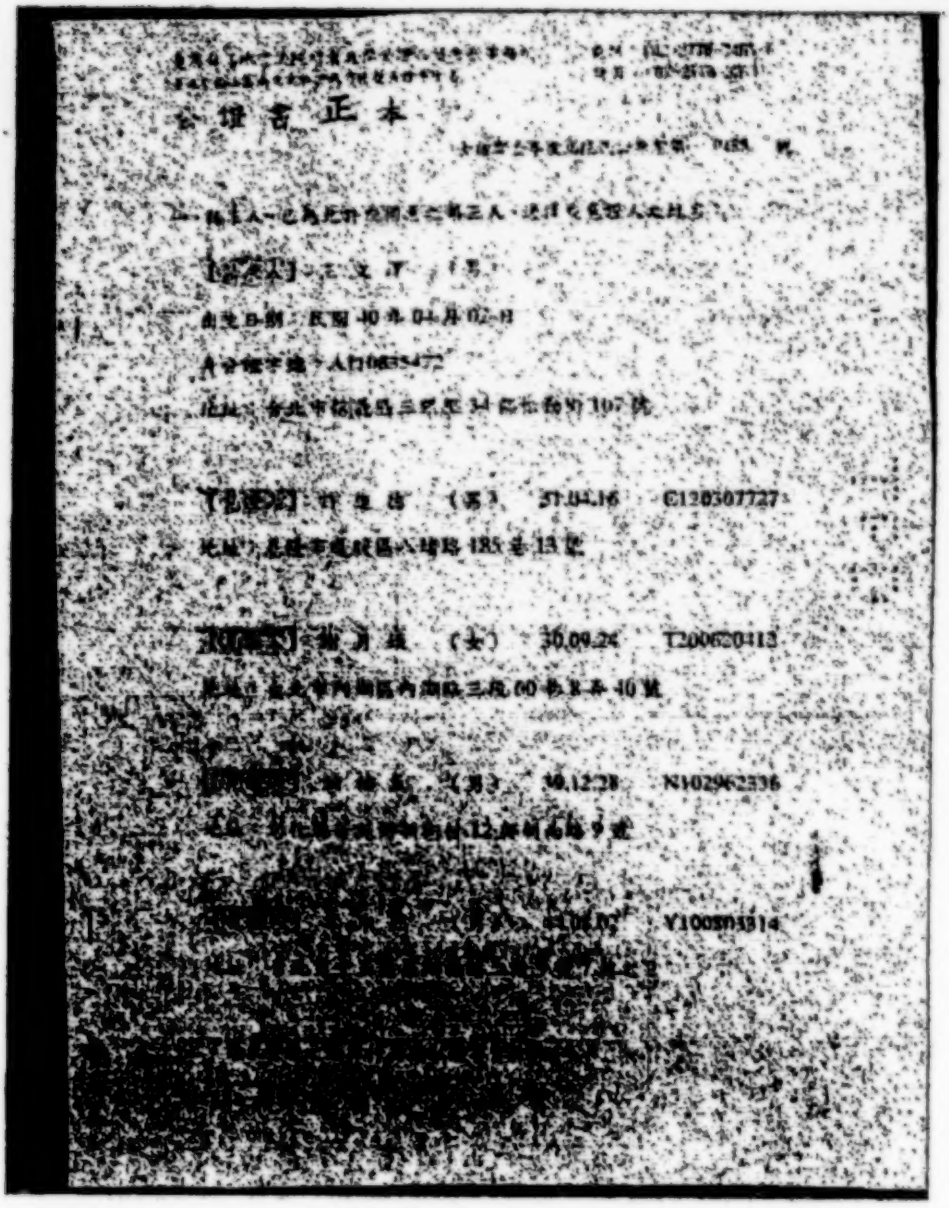
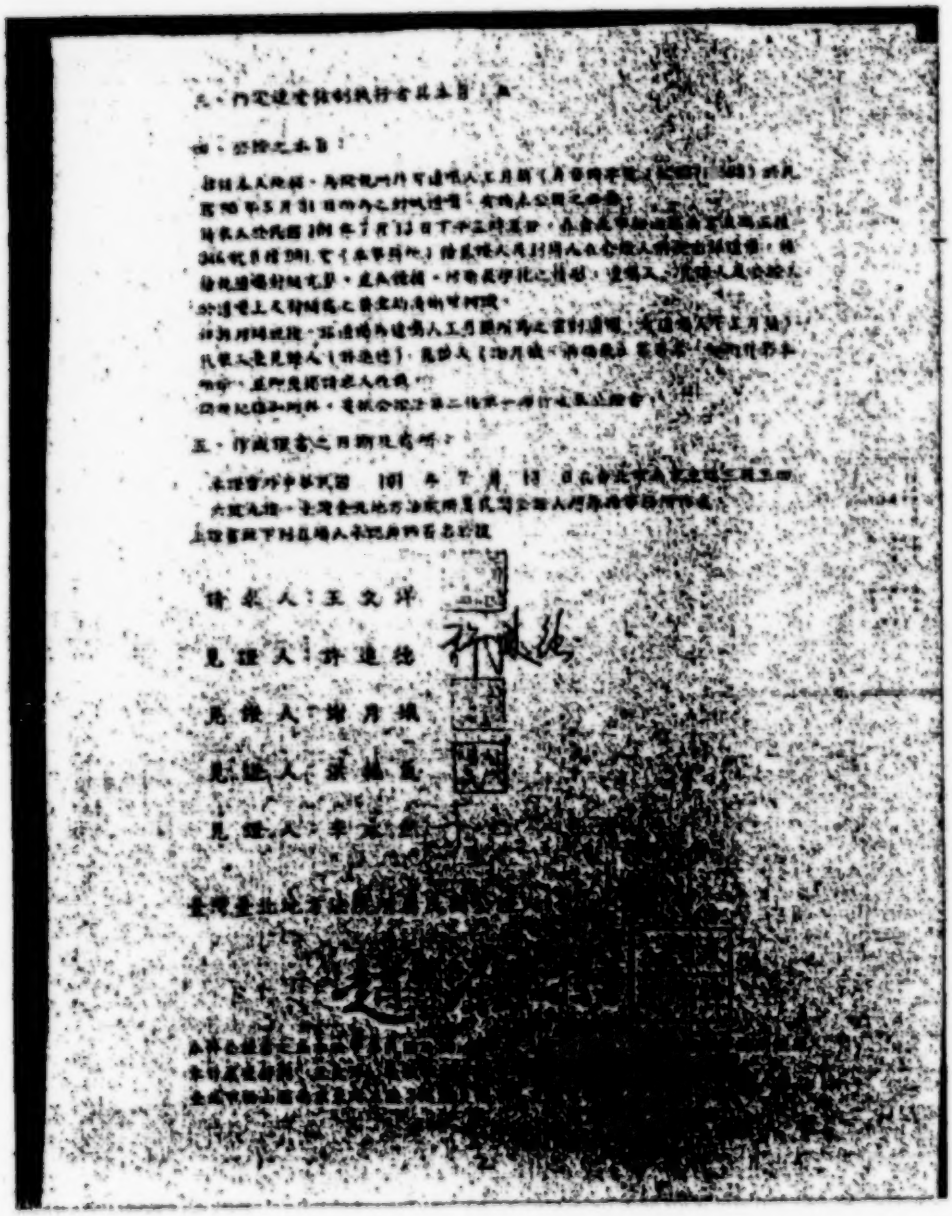
Will of Yueh-Lan Wang with Certified Translation dated May 31, 2001 ..... 1a



公證書正本



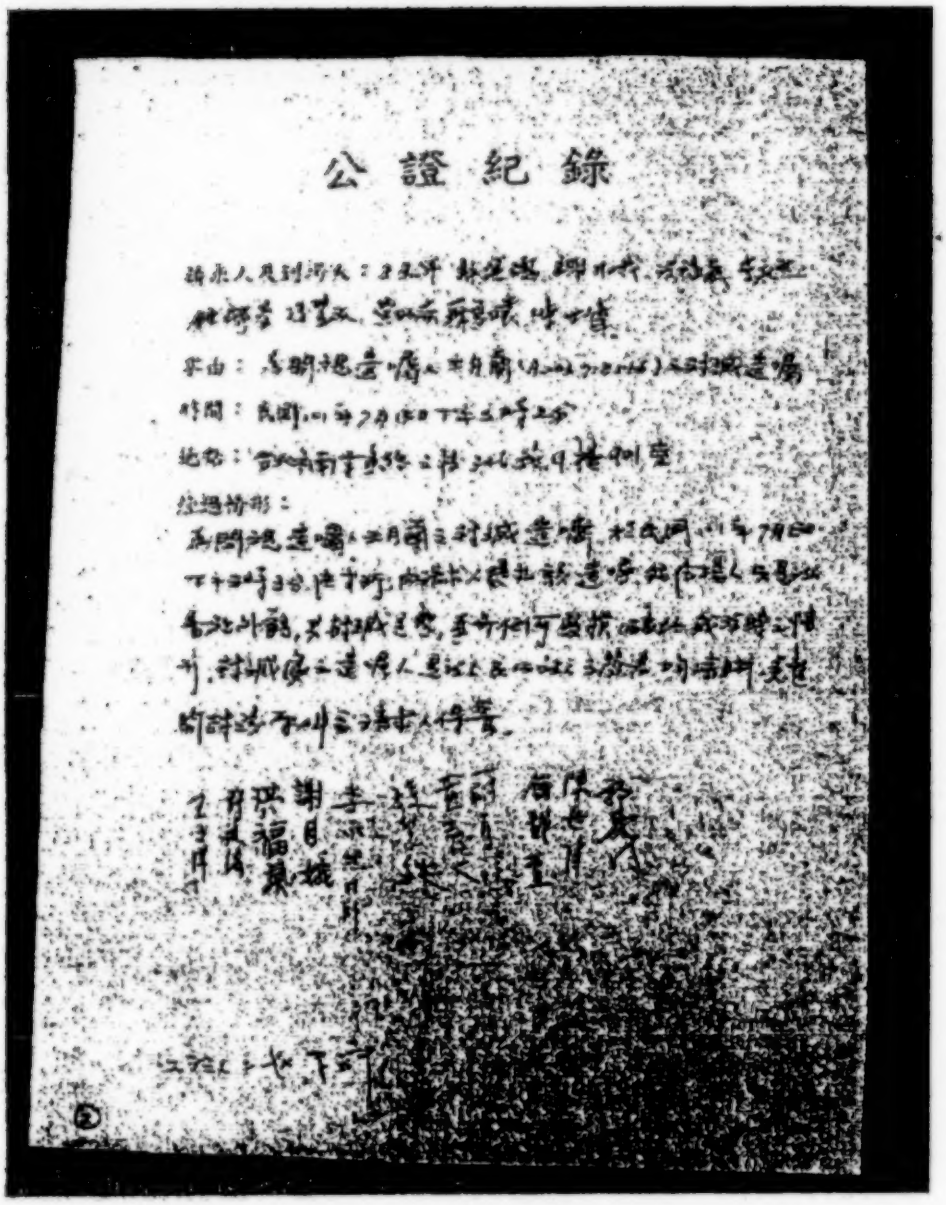
請 求 人：王 文 祥

見 證 人：許 連 德

見 證 人：謝 月 娥

見 證 人：洪 錦 鳳

見 證 人：李 來 發



公證紀錄

到場人及到場次：[illegible]

案由：[illegible]

時間：民國[illegible]

地點：[illegible]

經過情形：

[illegible]

[illegible]

Private Notary Public Chao Yuan Sun Firm
Affiliated with Taipei District Court of Taiwan
Room 901, 9th fl., Number 346, Nankin East
Road, Sung Shan District, Taipei City
Telephone: (02) 2778 – 3405 – 6
Fax: (02) 2778 – 3371

One Original Copy of Certificate of Notary

2012 Taipei Court Original Private Notary
Certificate Number 0489

1. Names of the requester, third persons, interpreter or witnesses with permission or consent:

[Requester]: Winston Wong (male)
Date of birth: April 2, 1951
ID card number: A10835472
Address: Number 107, Sung Chin Street, Lin 34, San Chang Li, Xinyi District, Taipei City

[Witness]: Chen-Teh Shu (male) April 16, 1962
C120307727
Address: Number 13, Lane 185, Pa Tu Road, Nuan Nuan District, Keeleung City

[Witness]: Yueh-Er Hsieh (female) September 24, 1941 T200620412
Address: Number 40, Alley 8, Lane 60, Section 3, Neihu Road, Neihu District, Taipei City

[Witness]: Fu-Chih Hung (male) December 28, 1950
N102962336
Address: Number 9, Hsin Nan Road, Lin 12, Hsin Chieh Village, Fang Yuan Hsiang, Chang Hua Hsian

[Witness]: Yung-Ran Li (male) August 2, 1955
Y100803314
Address: 7F – 2, Number 9, Roosevelt Road, Section 2, Chung Cheng District, Taipei City

2. Legal action of request for notarization or facts regarding private right:

Unsealing and viewing a will

3. Intent of person subject to direct enforcement by agreement: None

4. Purpose of notarization

According to a statement by the requester, to open and view the sealed will, which was held thereby and which was done by testator Yueh-lan Wang (ID card number: A203718566) on May 31, 2001, it was necessary to request notarization.

At 3:05 PM on July 13, 2012, together with witnesses and other persons present, the requester submitted this will in the presence of the notary public at Room 901, 9th fl., Number 346, Nankin East Road, Sung Shan District, Taipei City (our firm). Upon an examination, the seal on the will was complete, with no damage, dirtying and alteration. The seals affixed by the testator, witnesses and notary public on the will and the folds were legible and identifiable.

After the will was unsealed and viewed, it was the sealed will done by testator Yueh-lan Wang, with

signatures of testator (Yueh-lan Wang), preparer and witness (Chen-Teh Shu) and witnesses (Yueh-Er Hsieh and Fu-Chih Hung), et al. As shown in the attached photocopy, this was immediately returned to the requester for acceptance.

A record for unsealing and viewing is in the attachment. In accordance with Paragraph 1 of Article 2 of *The Law of Notary*, this certificate of notary is hereby completed.

5. Date and domicile where the certificate was completed:

This certificate of notary was completed on this July 13, 2012 at Room 901, 9th fl., Number 346, Nankin East Road, Sung Shan District, Taipei City, Private Notary Public Chao Yuan Sun Firm Affiliated with Taipei District Court of Taiwan.

The aforementioned certificate has been acknowledged by the following persons present, whose signatures appear below, as being true and correct

Requester: Winston Wong [seal: Winston Wong]

Witness: Chen-Teh Shu [signature: Chen-Teh Shu]

Witness: Yueh-Er Hsieh [seal: Yueh-Er Hsieh]

Witness: Fu-Chih Hung [seal: Fu-Chih Hung]

Witness: Yung-Ran Li [signature: Yung-Ran Li]

Private Notary Public Affiliated with Taipei District Court of Taiwan Chao Yuan Sun [seal: Notary Public Chao Yuan Sun]

An official copy of this certificate of notary was completed at our firm on this July 13, 2012 based on the original copy and delivered to Winston Wong for acceptance

Room 901, 9th fl., Number 346,
Nankin East Road, Sung Shan
District, Taipei City
Telephone: (02) 2778 – 3405 – 6
Fax: (02) 2778 – 3371

Will

I am already elderly and my health has recently been gradually declining. It is difficult for me to write on my own. Therefore, I have appointed Ms. Yueh-Er Hsieh, Mr. Fu-Chih Hung and Mr. Chen-Teh Shu, attorney, as my witnesses and have appointed my attorney, Mr. Chen-Teh Shu to record in writing my Will as orally dictated as follows:

1. Because I have no biological children of my own, for support and care in my daily life I have completely relied upon the help of one person – Wen-Young Wong, who has treated me as his natural birth mother and for which I am deeply touched and grateful.

2. If I pass away and die, I appoint my son Wen-Young Wong to handle all my matters after my death for me. Please do not cremate my remains.

3. After my death, all of my estate and the rights which I have and should have, and my legacy, after deducting funeral expenses, are totally gifted to my son Wen-Young Wong, including all the property which is under my name at 3rd Floor, No. 284, Chin Chou Street, Lin 19, Sun Chiang Li, Chung Shan District, Taipei City and the portion of the land on which it sits.

May 31, 2001

Testator: Yueh-Lan Wang [Seal, Signature and Fingerprint of Yueh-Lan Wang]

Witnesses: Yueh-Er Hsieh [Seal and Signature of Yueh-Er Hsieh]

Fu-Chih Hung [Seal and Signature of Fu-Chih Hung]

Concurrently as person writing on behalf of Yueh-Lan Wang:
Chen-Teh Shu [Seal and Signature of Chen-Teh Shu]

Notes on Notarization

Requester and persons present: Winston Wong, Chen-Teh Shu, Yueh-Er Hsieh, Fu-Chih Hung, Yung-Ran Li, Chung Ching Ying, Sun Hui Min, Huang Li Fen, Su Hsia Hsih and Chen Shih Wei.

Cause of action: To unseal and view the sealed will of testator Yueh-lan Wang (A203718566).

Date: 3:05 p.m., July 13, 2012

Address: Room 901, 9th fl., Number 346, Nankin East Road, Sung Shan District, Taipei City

Description of the process:

To unseal and view the sealed will of testator Yueh-lan Wang, at 3:05 p.m., July 13, 2012, at our firm, the requester submitted said will. The persons present and witnesses examined its appearance. Its seals were complete, without any mutilation, damage or dirtying. On the seals, the signatures of the testator, witnesses and notary were all legible and complete. After the unsealing, the original

document was turned over to the requester for safekeeping.

[Signatures:
Winston Wong
Chen-Teh Shu
Fu-Chih Hung
Yueh-Er Hsieh
Yung-Ran Li, Esquire
Sun Hui Min
Huang Li Fen
Su Hsia Hsih
Chung Ching Ying
Chen Shih Wei
Kuo [illegible]

Notary public Chao Yuan Sun

DSINTERNATIONAL LANGUAGE
CONSULTANTS inc.

TRANSLATOR'S CERTIFICATION

I, Xin Min Liu, hereby certify under penalty of perjury that I prepared the foregoing translation from Chinese into English of the attached document(s) referenced as, **Will of Yueh-Lan Wang**, that it is a complete and accurate translation of that attached document, and that I am competent to have made such a translation.

/s/ Xin Min Liu — 9-22-2015
Translator's Signature — Date
Xin Min Liu
(print below signature)

Address: PO Box 236
Chatham, NJ 07928

Acknowledgment

State of NJ
SS..
County of Morris

Sworn to and subscribed before me this 22nd day of September 2015

/s/ Donna A. Sukiennik
Donna A. Sukiennik
(Print name of notary below signature)

DONNA A SUKIENNIK
ID # 2382705
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires Feb. 24, 2019